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No. 03 61

In The
Supreme Court of the United States

JOHN TORTORELLI,

Petitioner,

v.

STATE OF WASHINGTON

On Petition For A Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can a state preempt federal maritime law by criminalizing the salvage or finding of objects lost on navigable waters, and by asserting that title to such property is vested in the state without a showing that such has been truly abandoned and is actually embedded in the state's lands?

2. Does the Submerged Lands Act, 43 U.S.C. §§ 1301(e), 1311(a), authorize states to lay claim to submerged logs and trees that would otherwise be subject to the general maritime law of salvage or finds, reserved by the Act, id. § 1314?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, John Tortorelli, respectfully prays that a writ of certiorari issue to review the April 10, 2003, judgment and opinion of the Supreme Court of Washington in the above-captioned proceeding.

OPINIONS BELOW

Petitioner seeks review of the opinion and judgment of the Washington Supreme Court of April 10, 2003, styled as *In re the Matter of the Personal Restraint of John Tortorelli* (Docket No. 71251-4), and reported at 149 Wash.2d 82 and 66 P.3d 606 (Wash. S.Ct. April 10, 2003), and reprinted at App. 1a. A prior decision of the Washington Court of Appeals, Division I, on Petitioner's personal restraint petition was reported at 104 Wash. App. 1003 (Wash. Ct. App. Jan. 2, 2001), and is reprinted at App. 16a.

A direct appeal of Petitioner's criminal conviction was decided by the Washington Court of Appeals, Division I, in *State v. Tortorelli*, and was reported at 86 Wash. App. 1046 (Wash. Ct. App. June 9, 1997), and is reprinted here at App. 32a. Review of that decision was denied without comment by the Washington Supreme Court at 137 Wash.2d 1011, 978 P.2d 1100 (Wash. S.Ct. Feb. 2, 1999).

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the Supreme Court of Washington of April 10, 2003. The U.S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition implicates the power of states to fashion substantive rules affecting the conduct of maritime commerce, in contravention of the Constitution's grant of admiralty jurisdiction to the federal courts in Article III, section 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction."), and Congress's Commerce Clause powers under Article I, section 8, clause 3 ("Congress shall have the Power . . . to regulate Commerce . . . among the several States. . . .").

Specifically at issue is the State of Washington's assertion of title over sunken logs and trees, otherwise subject to the federal maritime law of salvage and finds. Washington's statute asserting such title is Wash. Rev. Code Ann. §§ 76.36.010 & 76.36.020 (West 1994 & Supp. 2003), reprinted at App. 49a-50a. These provisions were ostensibly legislated pursuant to the State of Washington's constitutional provision declaring state ownership over navigable waters and beds. WASH. CONST. Art. XVII, § 1, reprinted at App. 51a.

This Petition also involves construction of the Submerged Lands Act (SLA) of 1953, 43 U.S.C. §§ 1301-1315, the relevant provisions of which are reprinted at App. 52a-56a.

STATEMENT

1. a. As does virtually every state in the Union, Washington has claimed ownership to the beds and shores of all navigable waters within its jurisdiction. WASH. CONST. Art. XVII, § 1 (adopted 1889); App. 51a. While Washington is the only state to constitutionalize this assertion of ownership,

other states accomplish the same result through legislation. See, e.g., Cal. Civ. Code Ann. § 670 (West 1982 & Supp. 2003); Fla. Stat. Ann. § 370.03 (West 2000 & Supp. 2002); La. Rev. Stat. Ann. § 9:1101 (West 2000 & Supp. 2003); Me. Rev. Stat. Ann. tit. 1, § 3 (West 1989 & Supp. 2003); N.H. Rev. Stat. Ann. § 1:16 (2002); Or. Rev. Stat. § 274.025 (2001 & Supp. 2003); R.I. Gen. Laws § 42-45.1-4(b) (2002); Tex. Nat. Res. Code Ann. § 11.012 (West 2001 & Supp. 2003); Va. Code Ann. § 28.2-1200 (2003). Other states derive their title from colonial charters, see, e.g., *Hirsch v. Maryland Dep't of Natural Resources*, 416 A.2d 10, 12 (Md. 1980); *Shepard's Point Land Co. v. Atlantic Hotel*, 44 S.E. 39, 41 (N.C. 1903), or by judicial recognition of the equal footing doctrine. See *Mobile Transp. Co. v. City of Mobile*, 30 So. 645, 646 (Ala. 1900); *Cinque Bambini Partnership v. Mississippi*, 491 So.2d 508, 511-12 (Miss. 1986), aff'd sub. nom. *Phillips Petroleum Co. v. Mississippi*, 482 U.S. 469 (1988).

In the wake of this Court's decision in *United States v. California*, 332 U.S. 19 (1947), Congress legislated the Submerged Lands Act (SLA), 43 U.S.C. §§ 1301 et seq., which confirmed and specified the states' rights over lands beneath navigable waters. See id. § 1301(a); App. 53a. The SLA made clear that states acquired "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters. . . . and . . . the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law. " Id. § 1311(a); App. 54a.

"Natural resources" was defined in the SLA to include, "without limiting the generality thereof, oil, gas, and all other

minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life. . . ." Id. § 1301(e); App. 53a. Despite this grant, the SLA reserved to the United States "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and] navigation. . . ." Id. § 1314(a); App. 55a.

b. The State of Washington in 1890 legislated an elaborate scheme to regulate the identification and recovery of floating and submerged logs and trees. Today, eight other states have statutes substantially similar to Washington's log escheat statute.[1] Additional states legislatively assert title over shipwrecks situated on their submerged lands.

One provision of the Washington legislation is an assertion of title over "unbranded or unmarked stray logs or forest products. . . ." Wash. Rev. Stat. § 76.36.020 (West 1994 & Supp. 2003) (originally enacted in 1890 Wash. Acts 110); App. 50a. The relevant "waters of the state" in or upon which the log statute is to apply are defined as "any and all bodies of bodies of fresh and salt water within the jurisdiction of the state capable of being used for the transportation or storage of forest products, including all rivers and lakes and their tributaries, harbors, bays, bayous, and marshes." Id. § 76.36.010(7); App. 50a. Some additional provisions of the

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[1] See Alaska Stat. § 45.50.235(a) (Michie 2002); Cal. Pub. Res. Code Ann. §§ 4851-4855 (West 2001 & Supp. 2003); Me. Rev. Stat. tit. 12, § 1867(2) (West 1994 & Supp. 2003); Mich. Compiled Laws Ann. § 324.32602 (West 1999 & Supp. 2003); Minn. Stat. Ann. § 103G.650 (subd. 2) (West 1997 & Supp. 2003); Miss. Code Ann. § 89-17-1 (2003); Mont. Code Ann. § 70-1-202 (2002); Wis. Stat. Ann. § 170.12(2) (West 1997 & Supp. 2003).

statute are devoted to regulations for the registration and enforcement of brands for logs and forest products. Id. §§ 76.36.060-.130.

Yet another aspect of the Washington legislation was the creation of a "log patrol," in which individuals were licensed by the state to recover lost or stray logs, and to receive a bounty from the state for such recovery. See id. §§ 76.40.010-.910 (repealed 1994). These log patrol provisions were fully and finally repealed in 1994, see 1994 Wash. Acts ch. 163, § 6, and although in force during some of the relevant periods of this case, they play no dispositive role in the matter, and are not at issue in this Petition.

2. In the early 1990's, the Petitioner, John Tortorelli, was engaged in the business of salving and retrieving submerged stray logs and tree remnants from Lake Washington, a navigable water. App. 1a. The stray logs had been cut and rafted in lumbering operations within the last 100 years, and had been stored in log yards. But they became waterlogged and sank to the bottom, coming to rest on the lake-bed. App. 1a-2a; 17a. The submerged trees had once been growing on an island in the middle of the lake. But due to an earthquake that occurred approximately 1100 years ago, that portion of the island broke off and fell into the lake, and the trees which had been growing on that land ended up underwater, strewn upon the lake-bed like spilled matchsticks. App. 2a; 8a-9a; 14a.

In 1991, Tortorelli had purchased equipment from an established log salvor, and entered into association with that entity. App. 2a-3a. He cooperated with forestry scientists in the identification of sunken trees. App. 4a. In June 1992, certain disputed conversations occurred between Tortorelli and representatives of Washington's Department of Natural Resources (DNR), in which the issue of the State's claim of right to stray logs and submerged tree remnants was raised.

App. 5a.

3. a. In October, 1992, DNR searched Tortorelli's home and salvage operations, and seized records, from which they concluded that he had illegally retrieved logs and trees. App. 5a. In August 1994, Tortorelli was charged with eight criminal counts, including the crimes of profiteering, theft of and trafficking in both submerged trees and stray logs, as well as making a false filing. App. 5a; 17a-19a n.1. One charge was later dropped. App. 5a n.1. With the exception of the false filing charge, all the other counts were factually and legally dependent on the state proving that Tortorelli had taken "the property of another," as required by the statute under which he was charged. Wash. Rev. Stat. Ann. § 9A.56.020(1)(a) (West 1994 & Supp. 2003); see also App. 1a, 6a. Tortorelli was not charged under subsection (c), which covers misappropriation of lost property. App. 6a.

At Tortorelli's criminal trial, he took no position on the State's ownership of the stray logs or submerged trees, neither contesting nor conceding that point, leaving it to the state to prove all material elements of its case. App. 5a; 16a. Tortorelli was nonetheless convicted on all counts, was sentenced to eight concurrent terms of 43 months in prison, and ordered to pay restitution. App. 5a. Petitioner has, in fact, served his sentence of 28 and a half months of incarceration, but still remains obligated to pay $188,031.27 in restitution to the State of Washington.

b. Tortorelli took a direct appeal of his conviction. App. 32a. The Washington Court of Appeals, Division I, ostensibly declined to review the issue of whether the State had proven the material element of the ownership of the logs and trees, because of an inadequate record and lack of briefing. App. 34a. Tortorelli's other arguments raised before the

Washington Court of Appeals[2] are not material to this Petition. The Washington Court of Appeals thus affirmed Tortorelli's convictions in all respects. App. 48a. The Washington Supreme Court then denied discretionary review of the direct appeal. 137 Wash.2d 1011, 978 P.2d 1100 (1999).

c. In Washington, collateral relief from criminal convictions is procured through a personal restraint petition, initiated in the Washington Court of Appeals. In a 2001 decision, that court concluded that there had been sufficient evidence to conclude that the logs and trees that Tortorelli had taken were "the property of another" under Wash. Rev. Stat. § 9A.56.020(1). App. 21a. The appeals court concluded that the State of Washington had asserted a claim to both the logs and trees, and had communicated such a claim to Tortorelli, App. 21a-23a, but did not otherwise address the question of whether the State's claim of title was valid. The appeals court also made clear that the State's ostensible reliance on the log patrol statute was not essential to Tortorelli's conviction, the predicate question of the State's title to the logs and trees having been satisfied. App. 24a-25a.

Tortorelli's additional arguments in the personal restraint petition proceedings[3] are not relevant to this Petition, and are not advanced here. The court of appeals dismissed the

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[2] These included a violation of attorney-client privilege by the State, App. 36a-40a, an improper charge under a general criminal statute, App. 40a-42a, a breach of the double jeopardy prohibition, App. 42a-45a, and his excessive sentencing, App. 45a-48a.

[3] These included an assertion of ineffective assistance of counsel, App. 25a-28a, and the materiality of any false filing made by Tortorelli, App. 29a-31a.

personal restraint petition. App. 31a.

d. Tortorelli then sought review of his personal restraint petition in the Washington Supreme Court, that tribunal granted review, and a divided court dismissed the petition. App. 13a. The Washington Supreme Court noted that the issue was one of first impression for it and ruled that, as a matter of law, the State of Washington owned the stray logs and submerged trees retrieved by Tortorelli, and thus they were "the property of another." App. 6a. The court relied upon Washington's constitutional provision declaring ownership of navigable waters and beds, WASH. CONST. Art. XVII, § 1; App. 51a, as well as the provisions of the federal Submerged Lands Act (SLA), granting the states title to natural resources found under their navigable waters. App. 6a-7a.

In particular, the Washington Supreme Court held that the SLA's provision defining "natural resources," 43 U.S.C. § 1301(e), included the submerged trees and logs. App. 7a-8a. The sunken trees, the court concluded, whether or not attached or embedded to Washington's submerged lands, were within the SLA's grant of title to the state. Additionally, the Washington Supreme Court held that even though the state's title over the sunken logs might not be justified under the SLA's "natural resources" provision, it was supported by the state's log escheat statute at Wash. Rev. Stat. Ann. § 76.36.020 (West 1994 & Supp. 2003); App. 50a.

Lastly, the court rejected the argument that the federal maritime law of salvage and finds preempted Washington's assertion of title over logs and trees lost and recovered on navigable waters and the state's criminalization of salvage operations for such property. App. 8a-9a. The court held, without further elaboration, that "we find the law of finds must

give way to our state and federal constitutions and laws, and we decline to apply it to these logs." App. 9a. The Washington Supreme Court thus ruled that the State of Washington could make a blanket assertion of title to sunken logs and trees without reference to whether the particular marine property was abandoned (and thus subject to the law of finds or the State's escheat), or whether it was actually embedded in the State's submerged lands. App. 9a. After dismissing Petitioner's other arguments, none of which are submitted for review here, the Washington Supreme Court dismissed the personal restraint petition. App. 13a.

e. The court's decision drew a strong dissent by Justice Sanders, joined by Chief Justice Alexander. App. 14a. The dissent observed that the majority opinion too readily dismissed what it characterized as a "common law" assertion of title based on the law of finds. "Under this doctrine, 'the finder of things that have never been appropriated, or that have been abandoned by a former occupant, may take them into his possession as his own property; and the finder of any thing casually lost is its rightful occupant against all but the real owner.'" App. 14a (quoting *Eads v. Brazelton,* 22 Ark. 499, 501 (1861)). The dissent concluded that "[b]ecause the ancient submerged trees fell into Lake Washington prior to the existence of the state and federal governments and none of the previous inhabitants lay claim to the trees, Tortorelli asserts ownership of the submerged trees under the law of finds." App. 14a.

The dissent also noted that the majority's conclusion that the State held title to stray logs and sunken trees was necessarily hinged on a flawed construction of the Submerged Lands Act's definition of "natural resources," 43 U.S.C. § 1301(e); App. 53a. Justice Sanders remarked that

> [a]s the majority notes, the act provides a nonexclusive definition of "natural resources."

> However, its illustrative examples, "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life," 43 U.S.C. § 1301(e), are all resources that grow or evolve naturally below water, rather than resources that once grew on dry land and then happened to end up beneath the surface by accident or natural disaster.
>
> The majority's conclusion is counterintuitive. The Submerged Lands Act speaks of minerals and marine life, not of sunken trees.

App. 14a-15a. The dissent would thus have ruled that the State of Washington could not have proven a material element of the charges against Tortorelli: that he had taken "the property of another" by divesting the State of what it rightfully owned. App. 15a.

REASONS FOR GRANTING THE PETITION

STATE ESCHEATS OF PROPERTY ON SUBMERGED LANDS, AT VARIANCE WITH ADMIRALTY DOCTRINES AND ACTS OF CONGRESS, CHALLENGE THE NATIONAL UNIFORMITY OF MARITIME LAW

This Petition calls upon the Court to once again exercise its authority as the ultimate guardian of the integrity and coherence of the nation's admiralty law. See *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) ("The issue is one of importance in the development of the law maritime, as to which we have

large responsibilities, constitutionally conferred. . . ."). It also raises issues this Court has already granted certiorari to resolve, although without actually ruling on the merits of these concerns. See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501, 508-09 (1998).

Starkly presented here is whether a state may prohibit – indeed, go so far as to criminalize – a traditional maritime activity that has been within the admiralty jurisdiction of the federal courts and the province of Congress to regulate for centuries. The State of Washington, as have many other states in the Union, has done precisely that with the salvage and recovery of logs and other forest products, based on a sweeping assertion of title to property lost on navigable waters wholly in contradiction with the general maritime law and relevant federal statutes. At stake is the uniformity of the federal maritime law as well as the proper scope of state claims to natural resources on their submerged lands.

A. Courts have divided on whether a state's assertion of title over property lost on its navigable waters must be consistent with general maritime law.

1. As already noted, see *supra* at 2-3, every state in the Union has asserted ownership over submerged lands underlying navigable waters within its territorial jurisdiction. This has led to disputes in which states have laid claim to property lost on those waters, the recovery of which would normally be regulated by the maritime law. This case – involving title to sunken stray logs and submerged trees – is part of a broader pattern in which states have purported to legislate rules for the escheat of lost property on navigable waters, even though such state legislation is manifestly at

variance with the general maritime law, as confirmed by various Acts of Congress.

a. For over a hundred and fifty years the salvage or recovery of property lost on navigable waters has been governed by the general maritime law of the United States, and disputes over the salvage and finds of such property are encompassed within the admiralty jurisdiction of the federal courts. See *Houseman v. The Cargo of the Schooner NORTH CAROLINA*, 40 U.S. (15 Pet.) 40, 48 (1841). Whether the lost property is legally abandoned (and is covered under the maritime law of finds; see *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-61 (4th Cir. 1992); *Martha's Vineyard Scuba H.Q. v. Unidentified Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065 (1st Cir.1987); *Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978)), or still has a legal owner (in which case it is governed by the law of salvage), the disposition of such property is governed under these "characteristic features" of the admiralty. See *American Dredging Co. v. Miller*, 510 U.S. 443, 446-47 (1994) (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) (a state law which "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations" is void)).

The fact that this case involves logs and forest products situated on navigable waters does not disparage the maritime aspect of this activity, nor lend any strength to a state's assertion of title over such items. Rafts of timber on navigable waters have been consistently regarded as property subject to the maritime law of salvage. See *Tidewater Salvage, Inc. v.*

Weyerhaeuser Co., 633 F.2d 1304 (9th Cir. 1980); *Whitmire v. Cobb*, 88 F. 91 (5th Cir. 1898); *Muntz v. A Raft of Timber*, 15 F. 555 (C.C.E.D. La. 1883); *Bywater v. A Raft of Piles*, 42 F. 917 (D. Wash. 1890); *Fifty Thousand Feet of Timber*, 9 F. Cas. 47 (D. Mass. 1871) (No. 4783); *A Raft of Spars*, 20 F. Cas. 173 (S.D.N.Y. 1849) (No. 11529); but see *Tome v. Four Cribs of Lumber*, 24 F. Cas. 18, 23-24 (C.C.D. Md. 1853) (No. 14083) (Taney, Circuit Justice) (rejecting salvage, on the facts of that case). This rule has been extended by federal courts to any property lost on navigable waters that has even a remote connection to maritime commerce or activities. See *Colby v. Todd Packing Co.*, 77 F. Supp. 956 (D. Alaska 1948) (fish trap frames subject to salvage).

Most importantly, the applicability of marine salvage to broad classes of property on navigable waters has been recognized by this Court. In *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887), the Court noted that while the only *structures* subject to salvage were those associated with vessels, other sorts of property lost at sea were subject to the maritime law of salvage. See id. at 630 (citing approvingly to *A Raft of Spars*, 20 F. Cas. at 173; and *Fifty Thousand Feet of Timber*, 9 F. Cas. at 47, while distinguishing Chief Justice Taney's opinion in *Tome*, 24 F. Cas. at 23-24, as being reflective of a local custom and not a general rule against the applicability of salvage to logs).

b. Objects lost on navigable waters that have not been legally abandoned thus still have an owner, and are subject to the maritime law of salvage. A salvor in these circumstances would be entitled to a generous salvage award from a federal admiralty court. See *The SABINE*, 101 U.S. 384 (1880). United States courts have consistently ruled that sovereigns may not divest title over private property that has

not been legally abandoned, exercising some sort of sovereign prerogative, or "droit of the admiralty" over property lost on navigable waters and cast upon the shore or resting on bottom lands. See *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 342-43 (5th Cir.1978); *United States v. Tyndale*, 116 F. 820, 822-23 (1st Cir. 1902). This rejection of a sovereign prerogative doctrine has also been made by the Massachusetts Supreme Judicial Court, in a decision which the Washington Supreme Court cited in its opinion, but otherwise chose to ignore and failed to distinguish. See App. 9a (citing *Commonwealth v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E.2d 549 (1988)).

For sovereigns that would assert a claim of ownership over property that has been lost on navigable waters, and has no current owner, the standard of abandonment is exacting, and is governed by the general maritime law, and not by state legislation or common law. As this Court has recently observed, whether an object lost on water is, in fact, abandoned and has no legal owner, is a question governed by the general maritime law. In *California v. Deep Sea Research, Inc.*, this Court construed the term "abandoned," as used in the Abandoned Shipwreck Act, 43 U.S.C. § 2101(b) (2002) (referring to wrecks "which have been deserted and to which the owner has relinquished ownership rights with no retention"), as "conform[ing] with its meaning under admiralty law." 523 U.S. at 508.

An equally significant qualification on a sovereign's right to escheat property lost at sea is that the object be embedded on its shores or in its beds. In its common law form, the embeddedness rule has been embraced by a number of state supreme courts as a limitation on the state's ability to simply declare that title to certain classes of abandoned property are

vested in the sovereign. See, e.g., *Favorite v. Miller*, 407 A.2d 974, 978 (Conn. 1978); *Goodard v. Winchell*, 52 N.W. 1124, 1125-26 (Iowa 1892); *Ferguson v. Ray*, 77 P. 600, 601 (Or. 1904). Despite this authority, the Washington Supreme Court held that "the law of finds must give way to our state and federal constitutions and laws, and we decline to apply it to these logs." App. 9a.

This embeddedness exception to the common law of finds has been recognized by federal courts as an integral part of the general maritime law on this subject. See *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985). In fashioning the terms of the Abandoned Shipwreck Act (ASA) of 1987, Congress had the opportunity to define the concept of embeddedness in relation to the Act's requirement that a shipwreck be *both* abandoned *and* embedded before the federal government would assert title in it and then quitclaim it to the state in which waters it was found. See 43 U.S.C. § 2105(a)(1). Indeed, embeddedness was defined in the ASA as "firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof." Id. § 2102(a). Congress legislated this provision to be "consistent with the recognized exception from the law of finds for shipwrecks embedded in submerged lands of a state." H.R. Rep. No. 100-514, 100th Cong., 2d Sess., Pt. 2, reprinted in 1988 U.S.C.C.A.N. 370, 376 (citing *Chance v. Certain Artifacts Found and Salvaged from the NASHVILLE a/kla The Rattlesnake*, 606 F. Supp. 801 (S.D.Ga.1984), aff'd, 775 F.2d 1511 (11th Cir.1985)).

2. The State of Washington has, via its constitution and laws, purported to exercise a sovereign prerogative over

property lost on its navigable waters, including the logs and trees at issue in this case. See WASH. CONST. Art. XVII, § 1 ("assert[ing] . . . ownership to the beds and shores of all navigable waters in the state. . . ."); Wash. Rev. Stat. Ann. § 76.36.020 ("Unbranded or unmarked stray logs or forest products become the property of the state when recovered."). This assertion of an escheat was accomplished through a broad claim of title, one made without requiring the state to prove *both* that the logs and trees that Tortorelli recovered were legally abandoned by their original owner *and* embedded in the beds of Washington's navigable waters. Unwilling to qualify its assertion of lost property to that which had been both abandoned and embedded, in conformance with the general maritime law, Washington has instigated a broad intrusion of state authority into federal admiralty law.

If the State of Washington were alone in pursuing this strategy, it might still merit this Court's review, as this Court exercised in the face of Washington's navigation regulations for oil tankers in state waters, largely struck-down in *United States v. Locke*, 529 U.S. 89 (2000). But Washington is among a fairly large group of states that have sought to displace the general maritime law of salvage and finds for lost property on their navigable waters by unilaterally legislating broad escheat statutes for such property.

a. A number of states have, by statute, asserted an escheat to logs, trees, and related timber property lost on navigable waters. Some jurisdictions have made the same claim to unbranded logs, irrespective of their ultimate legal status as abandoned and without reference to their embedded status. See, e.g., Alaska Stat. Ann. § 45.50.235 (Michie 2002) ("Timber property that is unbranded or on which a brand is not distinguishable and that is located in a coastal

water, lake, river, creek, or other waterway of the state or on state owned coastline is presumed to be the property of the state."). Other jurisdictions assert title to timber products that are merely "resting on the submerged lands owned by the state," without a showing of actual embeddeness or of legal abandonment. See, e.g., Me. Rev. Stat. Ann. tit. 12, § 1867(2) (West 1994 & Supp. 2003); Mich. Comp. Laws Ann. § 324.32602 (West 1999 & Supp. 2003) ("This state reserves to itself title and ownership of all submerged logs lying on or over, embedded in, or buried under unpatented lands."); Wis. Stat. Ann. § 170.12(2) (West 1997 & Supp. 2003). Yet other states prescribe a presumptive period of abandonment, after which the timber products on navigable waters are forfeited to the state. See, e.g., Alaska Stat. Ann. § 45.50.230(a)(2) (90-day period) (Michie 2002); Cal. Pub. Res. Code Ann. § 4855 (West 2001 & Supp. 2003) (six months); Minn. Stat. Ann. § 103G.650(2) (West 1997 & Supp. 2003) ("title and ownership of a log or historical artifact that rests for more than one year on submerged land owned by the state in inland waters is considered abandoned property that has forfeited to the state.").

The Washington Supreme Court's decision is also in conflict with those state supreme courts that have ruled that, as between private parties, title to stray logs does not shift, absent proof of both abandonment and embeddeness, and notwithstanding an escheat statute to the contrary. See, e.g., *Eastman v. Harris*, 4 La. Ann. 193 (1849); *Whitman v. Muskegon Log Lifting & Operating Co.*, 116 N.W. 614, 615-16 (Mich. 1908); *Somers v. Kane*, 202 N.W. 27, 28 (Minn. 1925). Alternatively, some state supreme courts have validated log escheat statutes, where both the requisites of legal abandonment and actual embeddedness were provided

for. See *Scott v. Willson*, 3 N.H. 321 (1825); *West Branch Lumberman's Exch. v. Enterline*, 24 A. 735 (Pa. 1892). Ironically, this was the posture of Washington's own property law, at least prior to the decision for which review is sought here. See *Maulsby v. Cook*, 235 P. 23, 25 (Wash. 1925).

b. It should be also noted that some states also assert blanket title to shipwrecks and other artifacts, typically without reference to a standard of abandonment in conformance with the general maritime law and a requirement of proof that the wreck is embedded in the states' public lands. See, e.g., Ala. Code § 41-9-249.1(b) (2003) (purporting to override any conflicting laws of salvage); Fla. Stat. Ann. § 267.061(1)(b) (West 2003) ("all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereignty submerged lands shall belong to the state. . . ."); Ga. Code Ann. § 12-3-80 (2003) (presumption of abandonment after 50 years; no embeddeness requirement); La. Rev. Stat. Ann. § 41:1605(A) (West 1990 & Supp. 2003); Miss. Code Ann. § 39-7-17 (2003) (overriding salvage law); N.C. Gen. Stat. § 121-22 (2003) (presumption of abandonment after 10 years); S.C. Code Ann. § 54-7-620(43)(b)(i) (2003) (providing for embeddedness rule, but presuming abandonment after 50 years); Va. Code Ann. § 10.1-2214(A) (Michie 1993 & Supp. 2003) ("'Underwater historic property' means any submerged shipwreck, vessel, cargo, tackle or underwater archaeological specimen . . . that has remained unclaimed on the state-owned subaqueous bottom. . . ."); Wash. Rev. Code Ann. § 27.53.045 (West 1997 & Supp. 2003) (presumption of abandonment after 30 years).

Prior to the Washington Supreme Court's decision in this case, the most serious state challenge to the supremacy of

the federal maritime law of salvage and finds was California's historic wreck statute. See Cal. Pub. Res. Code Ann. § 6313 (West 2001 & Supp. 2003). This provision purports to lay claim to "all abandoned shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California. . . ." Id. § 6313(a). These wrecks, sites and resources are to

> be given the broadest possible meaning, to include any submerged object, structure, building, watercraft, or vessel and any associated cargo, armament, tackle, fixture, human remains, or remnant thereof, or any site, area, person, or place, which is historically or archaeologically significant, or significant in the prehistory or history or exploration, settlement, engineering, commerce, militarism, recreation, or culture of California and which is partially or wholly embedded in or resting on state submerged or tidal lands.

Id. § 6313(b). In addition to relaxing the embeddedness requirement so as to include property merely "resting on state submerged or tidal lands," California has presumptively declared abandoned any property "remaining in state waters for more than 50 years. . . ." Id. § 6313(c).

In *California v. Deep Sea Research, Inc.*, this Court granted certiorari, in part, to review the question of whether California could take title to a valuable shipwreck, by "'assert[ing] that the Brother Jonathan is on its submerged lands and that ... § 6313 vests title in the State to abandoned shipwrecks on its submerged lands.'" 523 U.S. at 498 (quoting the lower court opinion in *The BROTHER JONATHAN*, 102 F.3d 379, 385 (9th Cir 1996)). More specifically, the issue was whether section 6313 was preempted by the exacting standards of the Abandoned

Shipwreck Act, requiring proof of both that the object lost at sea is legally abandoned (as that is understood under the maritime law) and is actually embedded in the state's submerged lands. See id. at 500 ("We granted certiorari to address whether a State's Eleventh Amendment immunity in an in rem admiralty action depends upon evidence of the State's ownership of the res, and to consider the related questions whether the Brother Jonathan is subject to the ASA and whether the ASA pre-empts § 6313.").

Ultimately, however, it was unnecessary for this Court to deal with the preemption of California's claim to lost property on its submerged lands. After unanimously deciding that the Eleventh Amendment did not preclude an in rem admiralty action in federal court, where the disputed property was not within the actual possession of a state, see id. at 507-08, and that the standard of abandonment mentioned in the ASA is coextensive with that provided in the general maritime law, see id. at 508, the Court, Justice O'Connor writing, observed:

> Our grant of certiorari also encompassed the question whether the courts below properly concluded that the ASA pre-empts § 6313, which apparently operates to transfer title to abandoned shipwrecks not covered by the ASA to the State. Because the District Court's full consideration of the application of the ASA on remand might negate the need to address the pre-emption issue, we decline to undertake that analysis.

Id. at 508-09.

3. This Petition thus presents the same question earlier accepted for review by this Court in *Deep Sea Research*, but does so in a manner more likely to be a successful vehicle for

resolution of this issue. First, no complications of sovereign immunity cloud the case. Next, the Washington constitutional provision and statutes in question here represent an even more audacious intrusion into federal maritime law than the California law featured in *Deep Sea Research*. Petitioner's criminal conviction clearly turned on the State of Washington establishing legal ownership over the logs and trees he recovered, and absent jury findings on the abandonment and embeddedness of the forest products, Washington's courts had recourse only to a sweeping claim of title which purposefully ignored the relevant admiralty law requirements.

Indeed, the State of Washington has gone so far as to actually criminalize conduct that would normally receive the approbation of federal admiralty courts. This pattern of state arrogation of federal maritime law authority was discredited by this Court as recently as three years ago in *United States v. Locke*, 529 U.S. 89 (2000), but given the continued pace of state legislation in this area, it is now required for the Court to again articulate the appropriate standard of preemption in cases such as this. As this Court observed in *Locke*, the typical "'assumption' of nonpreemption is not triggered where a state regulates in a realm where there has been a significant federal presence," id. at 108, and the general maritime law – including the commercial recovery of lost property on navigable waters – is surely one of these areas.

B. The state court's reliance on the Submerged Lands Act as the basis of title to sunken trees is manifestly contradicted by the statute and is in conflict with the rulings of other courts.

It appears that the Washington Supreme Court

believed, App. 7a-8a, that the State's assertion of title to sunken tree remnants – as distinct from stray logs – was supported by the federal Submerged Lands Act (SLA), particularly its provision defining natural resources, 43 U.S.C. § 1301(e); App. 53a, and the conditional grant of such resources to the State. See id. §§ 1311(a), 1314(a); App. 54a, 55a. This construction of the SLA is evidently in conflict with its text and the holdings of other courts that have considered the matter. If left unreviewed, Washington's use of its own state law to advance an eccentric interpretation of the SLA will give license to other states to do the same.[4] And, indeed, this will not be the first time that this Court has been required to exercise its supervisory power to correct an erroneous assertion by the State of Washington of its authority over submerged lands. See *Hughes v. Washington*, 389 U.S. 290 (1967) (question of ownership to accretions to beach property governed by federal, not state, law).

1. First, the Washington Supreme Court's extension of the "natural resource" language of section 1301(e) to the sunken trees found on Washington's submerged lands cannot bear close scrutiny, as the dissenters in that decision noted. See App. 14a-15a. Courts that have considered the issue have concluded that "natural resources such as oil and minerals were the main target of the legislation," and that this section was not likely intended to include forest resources that would somehow find themselves

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[4] If this issue is left unresolved, one might well see the results in the initiation of actions in the original jurisdiction of this Court. Currently, the Court has on its docket one such case which may turn on the proper construction of the SLA, as implemented in the Alaska Statehood Act. See *Alaska v. United States*, Orig. 128 (motion for leave to file bill of complaint granted, June 9, 2000) (Counts III & IV).

under water on submerged lands (as in flood conditions). See *United States v. Michigan*, 471 F. Supp. 192, 247 (W.D. Mich. 1979) (citing 2 U.S.C.C.A.N. 1385 (1953)).

Indeed, the Washington Supreme Court's interpretation is clearly at variance with the "established interpretative canons of *noscitur a sociis* and *ejusdem generis*," "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001); see also *Gutierrez v. Ada*, 528 U.S. 250, 255, (2000) ("[W]ords. . . are known by their companions"). Under this canon, the itemized list of things recognized as "natural resources" in 1301(e) – oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life – "are all resources that grow or evolve naturally below water, rather than resources that once grew on dry land and then happened to end up beneath the surface by accident or natural disaster." App. 15a.

Based on the statutory text it is unlikely that Congress intended forest remnants that are not actually embedded in the submerged lands of a state be conveyed by the SLA. See also *United States v. Ray*, 423 F.2d 16, 21-22 (5th Cir. 1970) (ruling that coral reefs, even if dead, are included in the definition of "natural resources" because they are a typical aquatic feature). As further proof of this, federal legislation specifically authorizes regulation of log and tree salvage on applicable lands, and does not assume that this would be a normal incident of sovereignty. See, e.g., 16 U.S.C. § 3203(g) (2003) (in a provision applicable only to Alaska, "[w]ithin National Forest wilderness and national forest monuments des[ig]nated by this Act, the Secretary of Agriculture may permit or otherwise regulate the recovery and salvage of logs from coastlines.").

SLA section 1301(e) thus should not have been read by the Washington Supreme Court as a grant of title to either stray logs or sunken trees on Washington's submerged lands, absent proof of abandonment and embeddedness.

2. But even more fundamentally, the state court's interpretation of the SLA as a grant of title in a particular species of property lost on navigable waters, without reference to the applicable federal maritime laws of salvage and finds, runs afoul of the SLA's savings clause. This provides that reserved to the United States is "all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and] navigation. . . ." Id. § 1314(a); App. 55a. No less an authority than this Court has ruled that section 1314(a) preserves the application of federal law to the commercial and maritime aspects of a state's use and regulation of submerged land resources. See *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 183-84 (1977) ("Since the grant of the fisheries license is made pursuant to the commerce power . . . the Submerged Lands Act did not alter its pre-emptive effect. Certainly Congress did not repeal by implication, in the broad language of the Submerged Lands Act, the Licensing Act requirement of equal treatment for federal licensees.") (citation omitted); see also *United States v. Louisiana*, 363 U.S. 1, 10 (1960).

The proper construction of the SLA, as raised in this case, thus implicates broad national concerns, especially in the relationship between state claims and the reserved power of the federal government (as jointly managed by Congress and the federal courts) to develop rules of conduct for maritime commerce. Petitioner will by no means suggest that states are to be hamstrung in their management of natural resources granted by the SLA. But where, as here, a state purports to

regulate and criminalize a traditional maritime activity, based on an assertion of ownership to property lost on navigable waters, that claim of title must be fully consistent with the general maritime law and Acts of Congress, and that appears to be precisely the legislative objective of the SLA's section 1314(a). If it were otherwise, those engaged in such maritime activities as salvage and recovery of property on navigable waters would face a patchwork quilt of non-uniform state regulations, the failure to observe which could have dire consequences.

One need hardly speculate about such results; the Petitioner faced those consequences, including the deprivation of his liberty. Petitioner's conviction was premised on the State of Washington's sweeping claim of title to the logs and trees Petitioner recovered, without any jury instructions or findings as to whether those objects were legally abandoned and actually embedded in Washington's submerged lands. Thus, contrary to the Due Process Clause, the State was improperly relieved of its obligation to prove one of the material elements of the offenses of theft and trafficking in stolen property: the taking of "the property of another." See *In re Winship*, 397 U.S. 358, 361 (1970). Petitioner's conviction was thus wrongful, and any legal consequences of it (including the duty to make restitution to the State) should be abated.

CONCLUSION

The Petition ought to be GRANTED.

Respectfully submitted,

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[5] Counsel acknowledges the assistance of Marlie A. McDonnell in the preparation of this Petition.

Supreme Court of Washington,
En Banc.

In the Matter of the Personal Restraint of John TORTORELLI, Petitioner.

No. 71251-4.

Argued May 9, 2002.
Decided April 10, 2003.

CHAMBERS, J.

John Tortorelli was found guilty of theft, trafficking in stolen property, and criminal profiteering, arising from his business of salvaging stray logs and submerged trees from Lake Washington. Tortorelli made several challenges to his convictions in his direct appeal, which were rejected by the Court of Appeals. In this personal restraint petition he raises numerous additional challenges, including insufficiency of the evidence that the logs and trees were "the property of another," as required by the statute under which he was charged, RCW 9A.56.020(1)(a), and ineffective assistance of counsel. We conclude as a matter of law that the State owned the salvaged logs and trees, and we reject his other claims.

FACTS

Until 1994, the Department of Natural Resources (DNR) issued log patrol licenses to authorize salvage of stray logs in return for a percentage of the profit. *See* former RCW

76.40.030, .050 (1984), *repealed by* Laws of 1994, ch. 163, § 6. This former log patrol statute provided that if the salvaged logs were branded, they were to be returned to the owner and the salvage operator would be allowed to keep 75 percent of their value. Former RCW 76.40.050(2). If, however, the logs were unbranded, the State asserted ownership, and in practice allowed the operator to keep 90 percent of the value. The licensee was required to inform DNR of the general location of the salvage operation and the specific location of the log storage in order to facilitate inspection.

The stray logs authorized for salvage by a log patrol licensee are not the same as the ancient forest remnants also found in Lake Washington. The ancient forest remnants were not lost from transportation or storage, but resulted from several landslides that occurred around the shores of Lake Washington about 1,100 years ago. These ancient trees have been preserved by the low oxygen content in the deep water. Because of their historic and scientific value, the trees by definition were not salvageable under the former log patrol statute.

In February 1991, Tortorelli, the owner of Western Wood Lumber, purchased salvage equipment including a barge and tug called the *Shawnee* from Carl Burgin and Roy Jamieson of Clearwater Marine Works, Inc. (Clearwater). Clearwater retained a barge and tug named the *Crawfish*. The agreement between Tortorelli and Clearwater was memorialized in two different documents. A security agreement provided in part that Western Wood Lumber could use permits issued to Clearwater if permitted by law. A cooperation agreement provided, among other things, that the two businesses would not directly compete with each other in the log salvage business.

On April 15, 1991, shortly after Tortorelli had his equipment towed from Everett to commence a salvage operation in Lake Washington, the State mailed him a letter advising that

the State owned all the unbranded logs in the lake, describing the regulations applicable to log salvage, and summarizing chapter 79.90 RCW, the aquatic lands act. The letter included a copy of the log patrol statute, former chapter 76.40 RCW, and the log patrol operating guidelines. In his application, Tortorelli indicated that his operation and log storage would be in Everett. The State therefore advised him of log patrol restrictions in and around the Everett harbor.

In August 1991, in apparent response to the April 15 letter, Tortorelli applied for a log patrol permit. However, he did so under the name Clearwater Marine Works and not Western Wood Lumber. He was neither an officer nor an employee of Clearwater. By applying in the name of Clearwater, he avoided the necessity of posting the $10,000 bond required of new applicants, and had to pay only the $500 required to license an additional boat. *See* former RCW 76.40.030(1).

Believing that both the *Crawfish* and the *Shawnee* were still owned by Clearwater, DNR issued a new license to attach to the *Shawnee.* When issuing the log patrol permit, the State sent Tortorelli another letter, reiterating which logs the State owned and enclosing revised operating guidelines.

While awaiting his new license, Tortorelli moved his operation to the ancient submerged forest on the southwest side of Mercer Island. Charts issued by the National Oceanic and Atmospheric Administration indicate that the forest extends to within 30 feet of the surface of the water. Some trees are anchored in the bed of the lake, but others were uprooted in about 1919 when the Corps of Engineers cleared the channel during construction of the Lake Washington ship canal. The timber the crew found at this site consisted of full length fir trees, about a hundred feet tall, with root balls attached. The crew raised the trees, then cut off the root balls and tops and

returned them to the water, retaining only the tree trunks.

In August 1991, while Tortorelli was working in the submerged forest area, he began to cooperate with Dr. Gordon Jacoby and Dr. Patrick Williams, scientists doing a tree ring analysis to date the sunken trees. Tortorelli provided slices from 18 different trees, each of which was found to be at least a thousand years old. In return, the scientists helped locate fallen trees by attaching buoys. Dr. Williams testified at trial that Tortorelli's crane would not be strong enough to lift a tree that was still rooted in the bed of the lake. However, the trees raised by Tortorelli, while not rooted, had been partially buried in the mud, as evidenced by preservation of the outer ring. The trees were still encased in mud when raised from the bed of the lake, and had to be dunked back in the water several times to remove mud.

In March 1992, after spending a few months in Everett, Tortorelli returned to Lake Washington, where he went to work in the Gene L. Coulon Memorial Beach Park area. Toward the end of the month, a metro sewer line was ruptured under the channel between Mercer Island and the eastern shore of Lake Washington, triggering extra scrutiny from DNR. On becoming aware of Tortorelli's operations in the area, DNR informed him that he needed to obtain a hydraulics project approval. Tortorelli accordingly applied, but carried on his operations without waiting to receive the permit.

On May 7, 1992, the Department of Fisheries issued a hydraulics project approval on condition that Tortorelli conduct a study to determine whether his operation was damaging crayfish, an important food source for bass and trout and a crucial part of the lake's ecology. Tortorelli was also required to stay south of the Interstate 90 Bridge. The same month Fisheries cited Tortorelli twice for operating outside the conditions of his hydraulics project approval permit. Both

citations were dismissed.

In June 1992, Steve Meacham of DNR and Tortorelli had an "extended discussion about where and when it was legal to collect stray logs," during which Meacham read Tortorelli large portions of the log patrol statute. Report of Proceedings (RP) (p.m. Jan. 31, 1995) at 26-28.

Four months later, the fisheries department executed a search warrant on Tortorelli's home and log patrol area, and seized records. The State determined that he had illegally seized trees worth $165,000.

Tortorelli was arrested in August 1994. He was charged with several offenses, which were consolidated into eight counts for trial: count 1, profiteering; counts 2 and 3, theft of and trafficking in submerged trees; counts 5, 6, 8, and 9, theft of and trafficking in stray logs; and count 4, offering a false document for filing.[1] At trial, Tortorelli did not contest nor concede the State's ownership of all the trees. In fact, Tortorelli had conceded the State's ownership of the logs and trees to a log patrol administrator prior to trial. Instead, he claimed a good faith belief that he had permission to salvage logs under Clearwater's license. The State countered, over Tortorelli's objection, with witness testimony that transfers of log patrol licenses are not legally permissible, a topic on which the statute itself is silent. Tortorelli did not take the stand on his own behalf. At the request of the defense, the trial court gave the entire log patrol statute to the jury as an exhibit, rejecting the State's request for a jury instruction on the statute.

Tortorelli was convicted of all counts. He was sentenced to 8 concurrent terms ranging from 12 to 43 months and ordered to pay restitution.

[1] Count 7 was dropped.

ANALYSIS

To prevail on his personal restraint petition, Tortorelli has the burden of establishing either error of constitutional magnitude resulting in actual prejudice or nonconstitutional error resulting in a complete miscarriage of justice. *In re Pers. Restraint of Cook,* 114 Wash.2d 802, 813, 792 P.2d 506 (1990).

Tortorelli was charged under a statute that requires the jury to find he was stealing "the property of another." RCW 9A.56.020(1)(a). He was not charged under subsection (c), which covers misappropriation of lost property. Thus, one of the elements the State must prove is that the logs and trees belonged to someone other than Tortorelli. At trial, Tortorelli did not contest that the State owned the logs and trees. However, in this personal restraint petition, Tortorelli argues for the first time that the State did not own the logs or, relatedly, that there is insufficient evidence of state ownership of the logs. We find both arguments unavailing.

First, we find as a matter of law, the State of Washington does own both the ancient forest and unbranded stray logs. Our constitution vests ownership of the "beds and shores of all navigable waters in the state" to the State. Const. art. XVII, § 1. While no Washington court has had occasion to rule on the ownership of logs or trees that have been a part of that lake bed for centuries, generally, the State has title to valuable assets within the beds of navigable waters, with exceptions not relevant here. *See* ch. 79.95 RCW; *see also Eisenbach v. Hatfield,* 2 Wash. 236, 240-41, 26 P. 539 (1891) (noting that the State as the successor to the king is the absolute owner of navigable waters and the soil under them).

Further support of State ownership appears in federal law. When the United States was constituted, the Constitution reserved to the original states the shores and beds of navigable

waters within their respective boundaries. *Martin v. Waddell,* 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842). Under the equal footing doctrine, states subsequently admitted to the Union obtained "the same rights, sovereignty and jurisdiction ... as the original States possess within their respective borders." *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423, 436, 18 L.Ed. 756 (1867). More recently, the Submerged Lands Act of 1953 confirmed that the states took title to natural resources found within navigable waters:

> It is determined and declared to be in the public interest that ... title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, ... [is] vested in and assigned to the respective States ... in which the land is located....

43 U.S.C. § 1311(a).

Tortorelli disputes whether the trees and logs were natural resources. "Natural resources" is defined in the Submerged Lands Act as "*without limiting the generality thereof,* oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301(e) (emphasis added). When a statute fails to fully define a term, we refer to dictionary definitions. *W. Telepage, Inc. v. City of Tacoma,* 140 Wash.2d 599, 609, 998 P.2d 884 (2000). *Webster's* dictionary defines "natural resources" as "materials ... supplied by nature." *Webster's Third New International Dictionary* 1507 (1993). Trees are "supplied by nature." The legislature has recognized that timber is one of the most valuable natural resources in the state. *See, e.g.,* RCW 76.13.005(4), .010(5). Thus, we have no difficulty in determining as a matter of law that trees are natural resources. The word "marine" is defined as "of or relating to

the commerce of the sea." *Webster's* at 1382. Because the Submerged Lands Act refers to all navigable waters in the United States, "marine" in this context encompasses navigable waters other than seas. We find no legal or logical reason to exclude the submerged trees from the definition of "natural resources" which also includes oil and gas which, like the trees, are resources as a result of ancient natural disasters and other natural occurrences.

The ancient forest trees are located "within" the waters or soil of Lake Washington. Under state and federal statutory and common law, the State owns the submerged trees. It is well established that "[u]nambiguous language does not require nor permit judicial construction." *State v. Michaelson,* 124 Wash.2d 364, 366, 878 P.2d 1206 (1994).

Once the trees have been cut into logs, it is not so clear that they are natural resources as meant by the statute because cut logs are not "supplied by nature." However, there is a separate basis for state ownership of stray logs, the marks and brands statute, which provides: "Unbranded or unmarked stray logs or forest products become the property of the state when recovered." RCW 76.36.020. Therefore, as a matter of law the State also owned the stray logs left by the Corps of Engineers in about 1919.

Tortorelli argues for the first time that under the "law of finds," the State had no title to the logs and trees. The law of finds is a common law principle granting title to the first party to discover and reduce to possession unknown or abandoned artifacts found in the sea. *Commonwealth v. Maritime Underwater Surveys, Inc.,* 403 Mass. 501, 531 N.E.2d 549 (1988). When the ancient trees slid from Mercer Island into Lake Washington 1,100 years ago, the State of Washington did not exist. Native American tribes do not claim ownership over the trees. Thus, Tortorelli argues that the trees are unowned and

under the law of finds he is entitled to salvage them. However, we find the law of finds must give way to our state and federal constitutions and laws, and we decline to apply it to these logs.

Because the submerged trees and stray logs belong to the State as a matter of law, Tortorelli cannot prove any actual and substantial prejudice, and we accordingly deny relief on these grounds.

In a similar vein, Tortorelli argues that the evidence was insufficient to convict because the State was allegedly relieved of its burden to prove an element of the crime, that the logs were owned by another. Sufficiency of the evidence is a question of constitutional magnitude because due process requires the State to prove its case beyond a reasonable doubt. *State v. Baeza,* 100 Wash.2d 487, 488, 670 P.2d 646 (1983) (citing *Jackson v. Virginia,* 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *In re Winship,* 397 U.S. 358, 361, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). Evidence is sufficient to convict when " 'viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*'" *State v. Green,* 94 Wash.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson,* 443 U.S. at 319, 99 S.Ct. 2781). We find Tortorelli has not met his burden for collateral relief.

First, we note that the jury was instructed to decide whether the prosecution had proved, beyond a reasonable doubt, that Tortorelli had taken the property of another. It did so find. Second, there was a wealth of evidence on the record from which the jury could so find. Tortorelli has shown no prejudice, and accordingly, we reject this claim.

Next, Tortorelli argues that there was insufficient evidence to determine that he operated under an invalid log patrol license. He claims that in 1991 he was authorized to operate under the Clearwater license. He bases this claim on a

contract document that states that he was entitled to use the Clearwater permits, if legal. However, the license in question was for the *Crawfish,* which Clearwater retained. Licenses are specific to the vessel operated. As a result, Clearwater's license for the *Crawfish* could not provide Tortorelli authorization to salvage logs while operating the *Shawnee.* In 1992, Tortorelli operated under a new license, but when he applied for the license in the name of Clearwater, he was neither an owner nor an employee of Clearwater. He was found guilty of falsifying a document in his license application. These facts are sufficient to establish that the license Tortorelli was using in 1992 was invalid. Therefore, Tortorelli has failed to establish a constitutional error.

Tortorelli also argues that the trial court should not have admitted a copy of the log patrol statute into evidence because it contains a presumption that anyone holding stray logs without a valid license did so "with intent to deprive and defraud the owner thereof." Former RCW 76.40.080 (1984). He argues that an irrebuttable presumption of one of the elements of theft violates due process. However, this contention is not properly before us because the State initially offered excerpts from the statute, and it is Tortorelli himself who wanted the entire statute admitted, including the portion of which he now complains. The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal. *See, e.g., State v. Henderson,* 114 Wash.2d 867, 870, 792 P.2d 514 (1990); *State v. Neher,* 112 Wash.2d 347, 352-53, 771 P.2d 330 (1989). Tortorelli failed to offer any limiting or curative instruction with respect to admitting the statute as an exhibit. Therefore, the invited error rule applies, and Tortorelli may not now complain on collateral attack that the trial court acceded to his request to admit the statute or that his due process rights were violated by the presumption contained in the statute. *See*

State v. Studd, 137 Wash.2d 533, 552, 973 P.2d 1049, 1058 (1999).

Tortorelli further argues that the trial court erred in failing to declare the law, leaving the jury to determine whether a log patrol license is transferable based on its interpretation of the log patrol statute and on opinion testimony from DNR that such transfers are illegal. The court has a duty to declare the law. Const. art. IV, § 16; *Pepperall v. City Park Transit Co.,* 15 Wash. 176, 183, 45 P. 743 (1896), 46 P. 407 (1896), *overruled on other grounds by Thornton v. Dow,* 60 Wash. 622, 111 P. 899 (1910). At trial, Tortorelli objected to Meacham's testimony that log patrol licenses could not be transferred and to the State's proposed jury instruction on transferability of log patrol licenses. The court noted the objection for the record and referred to a pretrial ruling that the witness may indicate whether or not a transfer was permissible.

Tortorelli's objection to Meacham's testimony at trial did not preserve the gravamen of his current argument for collateral review. Tortorelli must now show us that the trial court's alleged failure to declare the law was either constitutional error causing actual and substantial prejudice, or nonconstitutional error leading to a fundamental defect that inherently resulted in a complete miscarriage of justice. *See In re Pers. Restraint of Cook,* 114 Wash.2d at 810-11, 792 P.2d 506.

Assuming a constitutional error, Tortorelli has failed to prove actual and substantial prejudice. Assuming Clearwater's license was transferable, the license for the *Crawfish* did not provide Tortorelli authority to salvage stray logs while operating the *Shawnee.* Moreover, the legal question of whether the license was transferable is irrelevant to the factual issue of whether Tortorelli was acting under a good faith belief that he was authorized to salvage the submerged trees and stray logs. Consequently, Tortorelli has failed to prove actual and

substantial prejudice.

Tortorelli finally argues that failure to object to admission of the log patrol statute constitutes ineffective assistance of counsel. In order to establish ineffective assistance of counsel, the petitioner must show that counsel's performance was deficient and not a matter of trial strategy or tactics, and that the petitioner was prejudiced. *State v. Hendrickson,* 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996) (citing *Strickland v. Washington,* 466 U.S. 668, 688-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Washington courts indulge in a strong presumption that counsel's performance was reasonable. *State v. Garrett,* 124 Wash.2d 504, 518-19, 881 P.2d 185 (1994). Here, counsel allowed the admission of the entire log patrol statute in preference to excerpts from the statute, which the State wanted to admit. Admitting the entire statute enabled Tortorelli to argue his claim that he took the timber with good faith claim of title because there was "nothing in the log patrol guidelines that says a corporation cannot do exactly what Clearwater did, which is to authorize somebody to use their license." Report of Proceedings (Feb. 10, 1995) at 126. We find this to be a legitimate trial strategy and cannot be a basis for ineffective assistance of counsel. *State v. Brett,* 126 Wash.2d 136, 198-99, 892 P.2d 29 (1995).

The only conviction not based on the premise that the State of Washington owns the timber salvaged by Tortorelli is count 4. This is the charge of offering false documents for filing, based on Tortorelli's false representation of himself as an agent of Clearwater when applying for a new log patrol permit. The statute provides:

> Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed,

> registered or recorded in such office under any law of this state or of the United States, shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

RCW 40.16.030. Tortorelli argues that even though materiality is not mentioned in the statute, materiality is an element of the crime. For this proposition he cites to *State v. Price*, 94 Wash.2d 810, 620 P.2d 994 (1980). However, the issue in *Price* was not materiality but whether the document in question was an "instrument." *Id.* Thus, Tortorelli's citation to *Price* is not well taken. Even if materiality is required, the jury instructions as a whole required the false representation to be related "to a material fact represented in the document." State's Resp. to Pers. Restraint Pet., App. Q, Instruction 26. Tortorelli's implied representation that he was an agent of Clearwater was material.

We hold that the State of Washington had title to both the submerged trees and the stray logs. If admission of the log patrol statute was erroneous, the error was invited, and Tortorelli waived his right to object. The failure to object did not constitute ineffective assistance of counsel as it was based on legitimate trial strategy. We therefore affirm the trial court on all counts.

JOHNSON, MADSEN, IRELAND, BRIDGE, and OWENS, JJ., and SMITH, J. Pro Tem., concur.

SANDERS, J., dissenting.

As the majority notes, counts one, two, three, five, six, eight, and nine are all predicated on the State's asserted ownership of the submerged trees and the stray logs.[1] Majority at [6a]. Tortorelli contends the State submitted insufficient evidence to prove it owns the submerged trees Tortorelli allegedly stole from the State.

The common law supplements the criminal statutes "insofar as [it is] not inconsistent with the Constitution and statutes of this state...." RCW 9A.04.060. Tortorelli raises the common law doctrine of finds. Under this doctrine, "the finder of things that have never been appropriated, or that have been abandoned by a former occupant, may take them into his possession as his own property; and the finder of any thing casually lost is its rightful occupant against all but the real owner." *Eads v. Brazelton,* 22 Ark. 499, 501 (1861). Because the ancient submerged trees fell into Lake Washington prior to the existence of the state and federal governments and none of the previous inhabitants lay claim to the trees, Tortorelli asserts ownership of the submerged trees under the law of finds. Pet. for Review at 14. Without reaching the merits of Tortorelli's common law claim, the majority concludes as a matter of law that the State owns the submerged trees. Majority at [9a].

The majority reaches this astonishing conclusion by overstating the State's claim to natural resources under the federal Submerged Lands Act of 1953, 43 U.S.C. § 1301. Majority at [7a]. As the majority notes, the act provides a

[1] Tortorelli was originally charged with nine violations. Majority at 613. Count seven was dropped; the issue of title has no bearing on count four, offering a false document for filing. *Id.* at 609, 612.

nonexclusive definition of "natural resources." Majority at [8a]. However, its illustrative examples, "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life," 43 U.S.C. § 1301(e), are all resources that grow or evolve naturally below water, rather than resources that once grew on dry land and then happened to end up beneath the surface by accident or natural disaster.

The majority's conclusion is counterintuitive. The Submerged Lands Act speaks of minerals and marine life, not of sunken trees. Moreover, the rule of lenity requires the court to construe an ambiguous statute in a criminal case favorably to the accused. *In re Post Sentencing Review of Charles,* 135 Wash.2d 239, 249-50, 955 P.2d 798 (1998). This assures adequate notice, and thus due process, concerning what conduct will be considered illegal. *Liparota v. United States,* 471 U.S. 419, 427, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). Today's majority gives short shrift to this vital concern.

I therefore respectfully dissent.

ALEXANDER, C.J., concurs.

Court of Appeals of Washington, Division 1.

In re the Personal Restraint Petition of John TORTORELLI, Petitioner, STATE of Washington, Respondent.

No. 44340-2-I.

Jan. 2, 2001.

COX.

John Tortorelli seeks release from confinement by personal restraint petition on several grounds following his convictions for theft, trafficking in stolen property, use of proceeds of criminal profiteering, and offering a false instrument for filing. There was sufficient evidence to prove the "property of another" element of the crimes based on theft as well as all other elements of those crimes. The admission into evidence of a copy of RCW 76.40.080 did not relieve the State of its burden to prove an element of the crime of theft. The admission of opinion testimony on the transferability of log patrol licenses did not deprive Tortorelli of his right to a jury trial. Tortorelli received effective assistance of counsel. And the "to convict" instruction for offering a false instrument was proper.

Accordingly, Tortorelli has failed in his burden to show either constitutional error resulting in actual and substantial prejudice or nonconstitutional error amounting to a fundamental defect which inherently results in a complete miscarriage of justice. We dismiss the petition.

A few months prior to April 1991, Tortorelli purchased

from Clearwater Marine Works, Inc., a barge, crane, and tugboat. Between April 1991 and July 1992, he salvaged stray logs and trees from a sunken forest at the bottom of Lake Washington. The stray logs were cut and rafted within the last 100 years. The trees were over 1,000 years old and came to rest on the lake bottom as a result of an earthquake that sank a portion of what is now Mercer Island. Tortorelli sold the stray logs and trees to various mills. He used the proceeds from the sales to continue his log salvage operation.

In August 1991, Tortorelli applied to the Department of Natural Resources (DNR) for a log patrol license in the name of Clearwater. At that time, former RCW 76.40 required a license to salvage logs.[1] DNR issued a log patrol license in Clearwater's name, and sent the license to Tortorelli. After issuing the license, DNR began an investigation to determine whether Tortorelli was authorized to use Clearwater's name to obtain the log patrol license. It appears that DNR determined that Tortorelli was not so authorized.

The State charged Tortorelli with offering a false document for filing, theft, trafficking in stolen property, and use of the proceeds of criminal profiteering. Following a six-week trial, a jury found Tortorelli guilty on a number of counts.[2]

[1] Former RCW 76.40.030, .050 (repealed 1994).

[2] The counts of the amended information on which Tortorelli was convicted state in relevant part:

Count I [Use of Proceeds of Criminal Profiteering]

That (Tortorelli) knowingly received proceeds derived from a pattern of criminal profiteering activity, to-wit: three or more of the crimes of Theft in the First Degree and/or Trafficking in Stolen Property and used any part of the proceeds from said pattern of

(continued...)

[2](...continued)
criminal profiteering activity in the operation of an enterprise, to-wit: Western Wood Lumber and (Tortorelli's) business;

Count II [First Degree Theft]

That (Tortorelli), alone and together with others with intent to deprive another of property, to-wit: ancient submerged trees and logs from an underwater forest in Lake Washington, did wrongfully obtain such property belonging to the State of Washington,;

Count III [Trafficking in Stolen Property]

That (Tortorelli) did knowingly initiate, organize, plan, finance, direct, manage(,) and supervise the theft of property, to-wit: ancient submerged trees and logs from an underwater forest in Lake Washington, for sale to other persons, and did knowingly sell said stolen property to other persons,;

Count IV [Offering a False Instrument for Filing]

That (Tortorelli) did knowingly offer a false instrument, to-wit: an Application For Log Patrol License, to be filed or recorded in a public office, to-wit: the State Department of Natural Resources, which instrument, if genuine, might be filed or recorded in such office under any law of this State;

Count V [First Degree Theft]

That (Tortorelli) with intent to deprive another of property, to-wit: logs taken from the bed of Lake Washington, did pursuant to a common scheme or plan, wrongfully obtain such property belonging to another,;

Count VI [Trafficking in Stolen Properly]

That (Tortorelli) did knowingly initiate, organize, plan, finance, direct, manage(,) and supervise the theft of property, to-wit: logs taken from the bed of Lake Washington, for sale to other persons, and did knowingly sell said stolen property to other persons,;

Count VIII [First Degree Theft]

(continued...)

We affirmed his judgment and sentence in an unpublished opinion.[3] Our Supreme Court denied Tortorelli's petition for discretionary review. In April 1999, he filed this personal restraint petition.

Sufficiency of Evidence

Tortorelli argues in this petition that his due process rights under the Fourteenth Amendment were violated because the evidence was insufficient to support his convictions for theft, trafficking in stolen property, and criminal profiteering. We hold that there was sufficient evidence to convict him of these crimes.

Failure to raise a constitutional or nonconstitutional error on appeal does not bar consideration of that issue in a subsequent petition.[4] To prevail here, Tortorelli must establish either (1) actual and substantial prejudice arising from

[2](...continued)
That (Tortorelli) with intent to deprive another of property, to-wit: logs taken from the bed of Lake Washington, did pursuant to a common scheme or plan, wrongfully obtain such property belonging to another,;

Count IX (Trafficking in Stolen Property)

That (Tortorelli) did knowingly initiate, organize, plan, finance, direct, manage(,) and supervise the theft of property, to-wit: logs taken from the bed of Lake Washington, for sale to other persons, and did knowingly sell said stolen property to other persons,;

[3] *State v. Tortorelli,* No. 36560-6-I, (filed June 9, 1997) (1997 WL 306422).

[4] *In re Personal Restraint of Hews,* 99 Wn.2d 80, 87, 660 P.2d 263 (1983); *In re Personal Restraint of Cook,* 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

constitutional error, or (2) nonconstitutional error that inherently results in a complete miscarriage of justice.[5] Tortorelli has the burden of showing by a preponderance of the evidence that the alleged constitutional error caused him actual and substantial prejudice.[6] Bare assertions and conclusory allegations are not sufficient to command judicial consideration and discussion in a personal restraint proceeding.[7] The test of sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt the elements of the charged crime.[8] A claim of insufficiency of evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn from that evidence.[9] All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant.[10]

Tortorelli asserts there was insufficient evidence to prove that the logs and ancient trees were "the property of

[5] *In re Hews,* 99 Wn.2d at 88; *In re Cook,* 114 Wn.2d at 812; *In re Personal Restraint of Rice,* 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied, Rice v. Washington,* 506 U.S. 958 (1992).

[6] *In re Personal Restraint of Powell,* 117 Wn.2d 175, 184, 814 P.2d 635 (1991), *cert. denied, Powell v. DuCharme,* 516 U.S. 825 (1995).

[7] *In re Rice,* 118 Wn.2d at 886.

[8] *State v. Woods,* 63 Wn.App. 588, 590, 821 P.2d 1235 (1991).

[9] *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[10] *State v. Joy,* 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

another" under RCW 9A.56.020(1). That statute defines theft as "[t]o wrongfully obtain or exert unauthorized control over the *property* or services *of another* or the value thereof, with intent to deprive him of such property or services."[11] The term "property of another" is not defined in the statute, but its meaning can be derived from the definition of "owner"[12] under the theft statutes.[13] Thus, to constitute the "property of another," the item must be one in which another person has an interest, and the defendant may not lawfully exert control over the item absent the permission of that other person.[14] There was sufficient evidence here to establish that the State had an interest in the ancient trees and logs so that Tortorelli could not lawfully exert control over them without the State's permission. As to the ancient trees, there was ample evidence to support the State's claim of ownership over them. A DNR letter sent to Tortorelli and admitted into evidence explained that:

> Stray logs, as defined above, are not the same as ancient forest remnants, which are also found in Lake Washington. The ancient forest remnants are the result of several landslides [that] occurred around the shores of Lake Washington during the state's geologic past. Ancient forest remnants were not lost from transportation or

[11] (Italics ours).

[12] RCW 9A.56.010(10) defines owner as 'a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services.'

[13] *Joy,* 121 Wn.2d at 341 (citing *State v. Pike,* 118 Wn.2d 585, 589, 826 P.2d 152 (1992)).

[14] *Pike,* 118 Wn.2d at 590.

> storage. These trees are anchored by their tops and/or roots to what is now the lake bottom and are not salvageable under the Log Patrols statute. *The ancient forest remnants belong to the State of Washington and may not be retrieved, sold or tampered with in any manner whatsoever without the express permission of the State.*[15]

Moreover, Sheryl Beck, who managed sales of valuable materials from stateowned aquatic lands at DNR, testified that DNR has not permitted anyone to remove the ancient trees from the sunken forest in the bed of Lake Washington other than to allow sampling of portions of the trees by scientists. This evidence shows the State's active interest in excluding those other than scientists from asserting control over the trees. In short, the above evidence is sufficient to establish that the ancient trees were the "property of another" for purposes of Tortorelli's convictions. There was also sufficient evidence to establish that the State owned the stray logs. David Pierce, Log Patrol Program Administrator, telephoned Tortorelli in June 1992 and asked whether he had title to the stray logs. In a memorandum sent to the Attorney General's Office the next day, Pierce wrote down Tortorelli's response:

> Last evening-7:30 (6/18/92) [-] I called John Tortorelli at his home [y]our questions were proposed, listed here & then followed by his response.
>
> 1) Do you have title to the logs?
>
> *What he knows of the law is they are now stray logs & belong to the state.* He bases this on the

[15] Exhibit 93 (italics ours).

fact that the logs have been in place since the 40s or earlier.[16]

Tortorelli does not dispute this admission. Several documents were also admitted into evidence to support the State's claim that it owned the stray logs. These included letters that DNR sent to Tortorelli in which DNR explained that the State owned all non-branded logs pursuant to RCW 76.36.020.[17] Tortorelli does not dispute that the logs he recovered were unbranded. And there is nothing in the record to suggest otherwise. Viewing the evidence in the light most favorable to the State, a rational trier of fact could find that the stray logs and ancient trees belonged to the State, not Tortorelli. There was sufficient evidence to support Tortorelli's convictions. Thus, there is no showing of any constitutional error resulting in actual and substantial prejudice to him.

[16] (Italics ours).

[17] Exhibit 128 states that: '(t)he ownership of logs having merchantable value is retained by the registered brandholder, by law, even if the logs have been lost. If the log does not have a brand or ownership mark, the *law specifies that it belongs to the [S[tate* and can only be recovered and removed by a licensed log patrol.'

Exhibit 135 states that:

State-owned stray logs include:

1. logs branded with (DNR) brands
2. all non-branded logs
3. logs with non-identifiable brands
4. logs with non-registered brands where the log owner cannot readily be identified (RCW 76.36.020 and 76.40.060).

RCW 76.36.020 in turn states that '(u)nbranded or unmarked stray logs or forest products become the property of the state when recovered.'

Conclusive Presumption

Tortorelli next argues that by admitting former RCW 76.40 into evidence, which allegedly contained a conclusive presumption of the element of intent to deprive, the trial court violated his rights to due process and trial by jury. We hold that Tortorelli has not established any error that worked to his actual and substantial prejudice.

A petitioner has the initial burden of establishing that, more likely than not, he was actually prejudiced by the claimed constitutional error.[18] If actual prejudice is not shown, then we must deny the petition.[19] The trial court admitted the entire log patrol statute, former RCW 76.40, into evidence as exhibit 132. The specific statute at issue, former RCW 76.40.080, states that:

> Any *log patrol* having possession of stray logs, boom sticks, or boom chains, *except as herein provided shall be presumed to have and hold possession of same with intent to deprive and defraud the owner thereof and such possession shall be prima facie evidence of intent to deprive or defraud.*[20]

Tortorelli argues that any evidence supporting the State's contention that Tortorelli did not have a log patrol license automatically triggered former RCW 76.40.080's presumption of intent to deprive which relieved the State of its burden to prove the element of intent in theft. Tortorelli is not entitled to relief because he fails to show any actual prejudice. Tortorelli fails to demonstrate any actual prejudice from the alleged

[18] *In re Hews,* 99 Wn.2d at 88-89.

[19] *In re Hews,* 99 Wn.2d at 88.

[20] (Italics ours).

unconstitutional statute for two reasons. First, as the State points out, the statutory presumption did not apply to Tortorelli. This is because Tortorelli was not a log patrol as defined under the log patrol statutes[21] as he did not have a license. Tortorelli argues in his reply brief that if the statutory presumption in former RCW 76.40.080 did not apply to him, then the trial court erred by admitting irrelevant evidence. But even assuming the evidence was irrelevant, Tortorelli fails to show that such error actually prejudiced him or resulted in a complete miscarriage of justice.

Second, there is no showing that the admission of the statute relieved the State of its burden of proving the element of intent. To the contrary, the to-convict instructions clearly set forth that the State must prove intent to deprive in order to convict Tortorelli of theft. We presume the jury follows the trial court's instructions.[22] In sum, because Tortorelli has shown no actual prejudice from the admission of former RCW 76.40.080, we decline to reverse his convictions on this basis.

Ineffective Assistance of Counsel

Tortorelli also argues that his trial counsel's failure to object to exhibit 132 denied his constitutional right to effective assistance of counsel. We disagree.

[21] RCW 76.40.010(1) defines log patrol as 'any person *licensed by [DNR]* for the purpose of engaging in the recapture, return, or other disposition of stray logs from the waters of this state' (Italics ours).

[22] *State v. Hanna,* 123 Wn.2d 704, 711, 871 P.2d 135, *cert. denied, Hanna v. Washington,* 513 U.S. 919 (1994).

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance.[23] To prevail on a claim of ineffective assistance of counsel, Tortorelli must first establish that counsel's representation was deficient.[24] Deficient performance is established by showing that given all the facts and circumstances, counsel's conduct failed to meet an objective standard of reasonableness.[25] But deficient performance is not shown by matters that go to trial strategy or tactics.[26] We employ a strong presumption that counsel's representation was effective.[27]

Second, Tortorelli must show that the deficient representation resulted in prejudice such that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different."[28] Here, defense counsel's failure to object to exhibit 132, which contained former RCW 76.40.080, did not constitute deficient performance because there was a legitimate strategic reason for its admission. The defense theory below was that Tortorelli had permission to take the logs and trees through the log patrol program. Because exhibit 132 contained the entire log patrol statute that set forth

[23] *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[24] *State v. Hendrickson,* 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

[25] *State v. Huddleston,* 80 Wn.App. 916, 926, 912 P.2d 1068, *review denied,* 130 Wn.2d 1008 (1996).

[26] *Hendrickson,* 129 Wn.2d at 77-78.

[27] *McFarland,* 127 Wn.2d at 335.

[28] *Hendrickson,* 129 Wn.2d at 78.

regulations governing the log patrol program, it was critical in advancing Tortorelli's claim that he took the logs and trees with permission and with good faith claim of title. In fact, defense counsel objected to the State's proposed jury instruction 8A, which only included portions of the log patrol statute, as incomplete:

> On the Court's proposed [instruction 8A], we have a number of problems with that proposed instruction
>
> The first problem is that I think it is inaccurate as a statement of law. It is inaccurate because--for example, it states out in paragraph 1: you are instructed that the State of Washington regulates the taking of valuable materials in this way.
>
> That's not an accurate statement of law. There are extensive statutes on how the State regulates the taking. *The State's selective provisions here are in fact not complete and they are not accurate . . .*
>
> As given, [the Court's proposed instruction 8A], comment[s] on the evidence, it is not accurate[,] *it is not complete[,] and it precludes the defense in many ways from making some of its arguments on the good-faith taking.*[29]

Because Tortorelli did not establish deficient performance, we need not consider whether such performance

[29] Report of Proceedings dated February 9, 1995 at 53-54, 119 (italics ours).

resulted in prejudice.[30] Tortorelli received effective assistance of counsel.

Tortorelli asks us to consider Lenell Nussbaum's declarations to support his contention that trial counsel's failure to object to the admission of Exhibit 132 constituted deficient performance. But the declaration does not alter our conclusion that Tortorelli received effective assistance of counsel.

Duty to Declare Law

Tortorelli argues that the trial court committed constitutional error by admitting testimony that log patrol licenses are not transferable. We disagree.

Article 4, section 16 of our Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, *but shall declare the law.*"[31] Tortorelli claims that whether log patrol licenses are transferable should have been resolved by interpreting the log patrol statutes and thus was a question of law for the court to decide. Accordingly, Tortorelli asserts that the trial court violated its constitutional duty to "declare the law." Assuming, without deciding, that there was constitutional error, reversal is not warranted because Tortorelli has not shown that the error actually and substantially prejudiced him.

Tortorelli does not show actual and substantial prejudice from the claimed constitutional error because there was substantial evidence showing that Clearwater's log patrol license *was not transferred* to Tortorelli. Roy Jamieson and Carl

[30] *State v. Johnson,* 29 Wn.App. 807, 814, 631 P.2d 413, *review denied,* 96 Wn.2d 1009 (1981).

[31] (Italics ours).

Bergin, owners of Clearwater, testified that Tortorelli was not authorized to use Clearwater's log patrol license. Bergin also testified that he did not authorize Tortorelli to apply for future permits or licenses using Clearwater's name. And although Tortorelli asserts that the equipment sales agreement between Clearwater and Tortorelli[32] allowed him to use Clearwater's log patrol license, Bergin and Jamieson testified that the agreement did not authorize Tortorelli to use the log patrol license *in Lake Washington*. Rather, use of Clearwater's various permits for log recovery work was restricted to Mineral Lake.

Because Tortorelli has failed to show that the trial court's admission of testimony that log patrol licenses are not transferable actually and substantially prejudiced him, we decline to reverse his convictions on this basis.

Materiality

Tortorelli finally argues that "materiality" is an element of the offense of offering a false instrument for filing and the trial court violated his due process rights in failing to include that element in the to-convict instructions. We hold that materiality is not an element of the offense. Tortorelli was convicted of offering a false instrument for filing under RCW

[32] The sales agreement stated:
It is agreed that the business of (Clearwater) and the business of Tortorelli are two separate and distinct businesses that have their own separate obligations to their own separate employees, and it is not intended that there be any sharing of profits, nor any resulting joint venture or partnership arrangement Notwithstanding the preceding, Tortorelli may operate his business under the permit of (Clearwater) provided that doing so is authorized by all applicable laws. Report of Proceedings dated January 19, 1995 at 103-05.

40.16.030 when he applied for a log patrol license using Clearwater's name, where he was neither Clearwater nor authorized by Clearwater to do so. RCW 40.16 .030 states that:

> Every person who shall knowingly procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both.

The plain language of the statute omits reference to the word "materiality". A statute that is plain on its face is not subject to construction.[33] Thus, "materiality" is not an element of offering a false instrument for filing.[34] Tortorelli's reliance on *State v. Price*[35] for the argument that the case added materiality as an element of offering a false instrument for filing is misplaced. In Price, our Supreme Court addressed the issue of what constitutes "an instrument" under RCW 40.16.030 and held that:

> [W]e determine that the legislature intended that *RCW 40.16.030 encompass a document* which is

[33] *In re Marriage of Kovacs,* 121 Wn.2d 795, 804, 854 P.2d 629 (1993).

[34] *State v. Sanders,* 86 Wn.App. 466, 937 P.2d 193 (1997) (holding that the plain wording of RCW 40.16.030 does not require material falsity as an element of the offense of offering a false instrument for filing).

[35] 94 Wn.2d 810, 620 P.2d 994 (1980).

> required or permitted by statute or valid regulation to be filed, registered, or recorded in a public office if (1) the claimed falsity relates to a material fact represented in the instrument; and (2a) the information contained in the document is of such a nature that the government is required or permitted by law, statute or valid regulation to act in reliance thereon; or (2b) the information contained in the document materially affects significant rights or duties of third persons, when this effect is reasonably contemplated by the express or implied intent of the statute or valid regulation which requires the filing, registration, or recording of the document.[36]

Price is not controlling because the issue there was whether a steelhead receiving ticket was an "instrument" under RCW 40.16.030, not whether "materiality" was an element that the State must prove in order to establish a violation of RCW 40.16.030.

We dismiss the personal restraint petition.

[36] (Italics ours)

Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
John J. TORTORELLI, Appellant.

No. 36560-6-I.

June 9, 1997.

GROSSE, BECKER, and COX, JJ.

GROSSE, J.

Tortorelli operated a business that salvaged logs from Lake Washington. The State claims ownership of the logs and it claims that Tortorelli removed them without authority. Tortorelli was charged with theft, trafficking in stolen property, criminal profiteering, and offering a false document. Tortorelli appeals his convictions, claiming that his case should have been dismissed after the State obtained a privileged document; that he should have been charged under the log patrol statutes because they are special statutes that supersede the general statutes under which he was actually charged; that his multiple crimes should have been merged into one crime; and that his offender score was improperly calculated.

Record on Appeal

The trial was approximately six weeks long, involving considerable testimony. To support his brief, Tortorelli provided a verbatim record for only one day of testimony, a few days of motion hearings, and final arguments. Few of the many

exhibits and none of the sentencing and restitution hearings transcripts are provided. This record is grossly inadequate to support many of the assignments of error on appeal.

A party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue.[1] Even though the entire record is not required, "those portions of the verbatim report of proceedings necessary to present the issues raised on review" must be provided to the court.[2] We require citations to the record in the parties' briefs to support their contentions.[3] Absent an adequate record and citations to that record, we will not review a claim.[4] Here, even for the issues Tortorelli argues, he does not provide the necessary transcripts of the judge's rulings or the actual testimony. To make his factual assertions, Tortorelli relies on closing arguments, clerk's minutes, the certificate for probable cause, and briefs in the clerk's papers. Unfortunately, these shortcuts do not provide a sufficient record for review.

Because of the inadequate record, we will not reach the legal merits of the following issues: the admission of evidence of prior bad acts; the failure to offer jury instructions; and prosecutorial misconduct. Each of these issues requires us to

[1] *Olmsted v. Mulder*, 72 Wash.App. 169, 183, 863 P.2d 1355 (1993), review denied, 123 Wash.2d 1025 (1994); RAP 9.6; RAP 9.2

[2] RAP 9.2(b).

[3] RAP 10.3(a)(5).

[4] *State v. Wheaton*, 121 Wash.2d 347, 365, 850 P.2d 507 (1993).

consider whether there was any prejudice to Tortorelli,[5] which we cannot do with the record as it has been presented. We also will not consider his numerous ineffective assistance of counsel arguments because in order to judge this issue we must review the entire record to determine whether a defendant has met his or her burden to show the alleged deficiencies in representation and the resulting prejudice.[6] Without the entire record, we are unable to pursue such an inquiry. Additionally, again because of the lack of record, we cannot reach Tortorelli's claims that restitution was ordered in excess of the proof and without proof of the State's ownership.

At oral argument, the panel and the parties discussed whether the State had proved ownership of the logs. Tortorelli then made a motion to supplement the record in order to argue that the State had not proven this fact. Despite our expressed interest in this issue, we must deny this motion because Tortorelli did not argue this point in his brief. We have sifted through his brief and cannot locate a comprehensive argument about ownership. Although Tortorelli occasionally asserts that ownership was not proven, this is not enough. In order for us to review a claimed error, the party must assign error to that issue and address argument to that claim.[7] Here, Tortorelli has not argued the relevant issues in the body of his brief with

[5] *State v. Robtoy,* 98 Wash.2d 30, 44, 653 P.2d 284 (1982); *State v. Washington,* 64 Wash.App. 118, 126, 822 P.2d 1245, review denied, 119 Wn.2d 1003 (1992); *State v. Pirtle,* 127 Wash.2d 628, 672, 904 P.2d 245 (1995), cert. denied, U.S., 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

[6] *State v. McFarland,* 127 Wash.2d 322, 334-38, 899 P.2d 1251 (1995).

[7] RAP 10.3(a)(3); RAP 10.3(g).

citations to authority and to the record.[8]

From the limited record, we can discern the following: Tortorelli operated a business that salvaged logs from the bed of Lake Washington in 1991 and 1992. Some of the trees he took were over 1,000 years old and were in the lake as a result of ancient mud slides. Tortorelli used a barge, crane, and tugboat that he bought from Clearwater Marina, Inc. The State claimed that the owners of Clearwater Marina did not give Tortorelli permission to use Clearwater Marina's log patrol license or permission to use the Clearwater Marina name to obtain a license. In 1991 and 1992, a log patrol license was necessary to salvage logs. Under the former log patrol statutes, a person must be licensed to salvage stray logs, and recovered stray logs must be sold as directed by the State.[9]

The State alleged that because Tortorelli did not comply with these statutes, he did not have permission to take the logs. The State also claimed that after taking the logs, he trafficked in stolen property by delivering them to various mills, and that he used funds received from the mills so that he could continue his log recovery operation. Tortorelli did not deny recovering sunken logs, and he did not deny selling them to the various mills. Rather, he claimed that he did not steal the logs because he had a good faith claim of title to them.

In 1995, Tortorelli was convicted of first degree theft and trafficking in stolen property for three non-adjoining time

[8] *State v. Olson,* 126 Wash.2d 315, 323, 893 P.2d 629 (199[illegible].

[9] Former RCW 76.40.030, .050, repealed by Laws of 1994, ch. 163, 6.

periods of log removal activity.[10] He was convicted of using the proceeds of criminal profiteering in his business for the period of 1991-92.[11] He was also convicted of offering a false instrument to apply for a log patrol license on August 25, 1991.[12] Tortorelli appeals his eight convictions.

Attorney/Client Communications

Tortorelli claims the trial court erred by not dismissing his case after the State obtained a document that the trial court determined to be privileged. The document consisted of several handwritten pages found in a large envelope, with copies of statutes, regulations, and district court pleadings. The envelope was stamped with an attorney's return address. Tortorelli apparently wrote this statement in the spring of 1992 to detail his salvaging activities and permit problems, after he had been arrested for misdemeanor hydraulic permit violations. These charges were dismissed that summer.

In the fall, after the misdemeanor charges had been dismissed, the envelope was obtained in the execution of a search warrant. In 1994, the State used the document while cross-examining one witness in a hearing before an inquiry judge. The trial court granted Tortorelli's motion to suppress this evidence, concluding that the materials were confidential and protected by the attorney- client privilege. However, the trial court denied Tortorelli's motion to dismiss.

Tortorelli argues that his right to effective assistance of

[10] RCW 9A.56.030(1)(a), .020(1)(a), RCW 9A.82.050, .010(10).

[11] RCW 9A.82.080(1), .010(14).

[12] RCW 40.16.030.

counsel was violated because the State obtained information that gave it an improper advantage and, thus, the only remedy is dismissal. The State counters that the Sixth Amendment right to counsel had not attached when the document was seized and used because no charges were then pending.

The evidentiary attorney/client privilege and the Sixth Amendment right to counsel are linked. When privileged communications between a defendant and his or her counsel are intercepted, this can violate the Sixth Amendment[13] because it may result in the prosecutor's use of confidential defense strategy to prepare the State's case, in the use of tainted evidence against the defendant at trial, and in the destruction of the defendant's confidence in his or her attorney.[14] In short, such interception can threaten the ability of a defendant to adequately prepare to face charges:

> The fundamental justification for the sixth amendment right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense. Free two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful. The purpose of the attorney-client privilege is inextricably linked to the very integrity and accuracy of the fact

[13] E.g. *State v. Cory*, 62 Wash.2d 371, 382 P.2d 1019 (1963).

[14] *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir.1980). See *Weatherford v. Bursey*, 429 U.S. 545, 558, 9 S.Ct. 837, 51 L.Ed.2d 30 (1977).

finding process itself.[15]

In *State v. Cory,* our Supreme Court dismissed the defendant's charges after a sheriff recorded conversations between the defendant and his attorney because it was impossible for the State to demonstrate the absence of prejudice.[16] By comparison, in *State v. Grant,* the Court of Appeals found that the State had demonstrated that the defendant was not prejudiced, despite the police having improperly tape recorded a conversation, because the State subsequently screened off the tainted evidence.[17] In both cases, it was the State's burden to demonstrate that it was possible to "isolate the prejudice" resulting from the interception.[18]

Neither *Cory* nor *Grant* directly apply to this case because in both the defendants were charged with a crime at the time of the interception and, thus, the right to counsel had attached. There is a fundamental distinction between the use of privileged information at trial and its use during the investigatory period.[19] Here the State intercepted the privileged

[15] *United States v. Levy,* 577 F.2d 200, 209 (3d Cir.1978).

[16] *State v. Cory,* 62 Wash.2d at 376-78, 382 P.2d 1019.

[17] *State v. Grant,* 9 Wash.App. 260, 266-67, 511 P.2d 1013, review denied, 83 Wn.2d 1003 (1973), cert. denied, 419 U.S. 849 (1974).

[18] *Cory,* 62 Wash.2d at 377, 382 P.2d 1019; *Grant,* 9 Wash.App. at 266, 511 P.2d 1013. See also *State v. Burri,* 87 Wash.2d 175, 183, 550 P.2d 507 (1976).

[19] *United States v. Rogers,* 751 F.2d 1074, 1077-78 (9th Cir.1985). See *United States v. White,* 879 F.2d 1509, 1513 (7th Cir.1989), cert. denied, 494 U.S. 1027 (1990); *United States ex rel.*

(continued...)

document while investigating Tortorelli. It had not yet charged him for theft, trafficking, profiteering, and falsifying documents. The timing is crucial. It is well established that the right to counsel attaches only when the State has begun formal proceedings, such as charging the defendant.[20] The right to counsel does not attach during inquiry judge proceedings.[21]

The fact that Tortorelli prepared the document when he was subject to related misdemeanor charges only establishes the nature of the document -- that it was a privileged attorney/client communication.[22] This fact does not establish the remedy for the improper interception of that communication after those charges were dismissed. In cases where the defendant seeks to assert the attorney/client privilege, but where the Sixth Amendment is not implicated, it is the defendant's burden[23] to demonstrate application of the privilege, any prejudice, and the inadequacy of the remedy of suppression. Based on the limited record, we cannot find that Tortorelli has met his burden to show that suppression of the document was an inadequate

[19](...continued)
Shiflet v. Lane, 815 F.2d 457, 464-65 (7th Cir.1987), cert. denied, 485 U.S. 965 (1988).

[20] *State v. Kalakosky,* 121 Wash.2d 525, 534, 852 P.2d 1064 (1993); *State v. Judge,* 100 Wash.2d 706, 714, 675 P.2d 219 (1984).

[21] Cf. *Sheriff, Clark County, Nevada v. Bright,* 108 Nev. 498, 835 P.2d 782, 835 P.2d 782, 784 (1992).

[22] Cf. *United States v. Mackey,* 405 F.Supp. 854, 860-61 (E.D.N.Y.1975).

[23] See *R.A. Hanson Co. v. Magnuson,* 79 Wash.App. 497, 501, 903 P.2d 496 (1995), review denied, 129 Wash.2d 1010 (1996). See generally, *Dike v. Dike,* 75 Wn.2d 1, 75 Wash.2d 1, 448 P.2d 490 (1968).

remedy.

Special/General

Tortorelli claims that the charges should have been dismissed because the State failed to charge him under a special statute, former RCW 76.40, and the statute of limitations had run with respect to that special statute. Where a special statute punishes conduct that also is punished under a general statute, the statutes are concurrent and the defendant must be charged under the special statute.[24] A special statute is concurrent with the general statute only if is not possible to commit the special crime without also committing the general crime.[25]

Tortorelli focuses on former RCW 76.40, looking at the chapter as a whole. The proper analysis is to look at the elements of the individual crimes proscribed by RCW 76.40, comparing those elements to the elements of the charged crimes. While Tortorelli asserts that former RCW 76.40.130, which merely provides that "[a]ny violation of this chapter shall be a gross misdemeanor," is a special statute, we cannot agree. This provision cannot be termed a "special" statute within the meaning of the requisite inquiry. By committing many of the "[a]ny violation[s] of this chapter,"[26] a person would not necessarily have committed the general crimes of theft, trafficking in stolen property, criminal profiteering, or offering a false document. For example, a person could have committed a gross misdemeanor by failing to have a log patrol license

[24] *State v. Walker,* 75 Wash.App. 101, 105, 879 P.2d 957 (1994), review denied, 125 Wash.2d 1015 (1995).

[25] *Walker,* 75 Wash.App. at 105, 879 P.2d 957.

[26] Former RCW 76.40.130.

displayed on his or her boat.[27] Clearly, the misdemeanor crime does not contain any of the elements of the crimes for which he was convicted.

Tortorelli also points to former RCW 76.40.080, which provided: -

> Any log patrol having possession of stray logs, boom sticks, or boom chains, except as herein provided shall be presumed to have and hold possession of same with intent to deprive and defraud the owner thereof and such possession shall be prima facie evidence of intent to deprive or defraud.

He asserts that "by referencing a 'presumption of intent to deprive' ... the purpose of the statute was, in part, to provide riminal sanctions for the type of [Tortorelli's] activities." Former RCW 76.40.080 did not create a crime, rather its purpose was to create a presumption. No provision in former RCW 76.40 required an "intent to deprive" as an element of an offense. Although former RCW 76.40.020 made it unlawful for a person "to hold any stray logs" or to engage in any log patrol activities without a license, "intent to deprive" was not an element. Because it was possible to violate RCW 76.40.020 without committing the crimes of theft, trafficking, profiteering, and offering a false document, RCW 76.40.020 is not a concurrent special statute.

Tortorelli also argues that former RCW 76.40.910, which provided that "[i]n case of conflict with any existing provision of law, the provisions hereof shall prevail," reflects a legislative intent that former RCW 76.40 exclusively governs log patrol activities. That may be true, but the theft, trafficking

[27] Former RCW 76.40.040; former RCW 76.40.130.

in stolen property, and use of criminal proceeds statutes do not thereby conflict. The fact that one might be in violation of both the log patrol statutes and the criminal code is not a conflict requiring application of one or the other statutory schemes.

Tortorelli's assertion that equal protection was violated by the State's decision to charge him under the theft, trafficking, and criminal proceeds statutes instead of the log patrol statutes is simply wrong. As our Supreme Court has made clear, "there is no equal protection violation when the crimes that the prosecuting attorney has the discretion to charge require proof of different elements."[28] The charged offenses require proof of elements different than the former log patrol statutes and thus do not implicate equal protection.

Double Jeopardy/Merger

Tortorelli claims his convictions violate the prohibition against double jeopardy. "[T]he guaranty against double jeopardy protects against multiple punishments for the same offense."[29] However, since the Legislature has the power to define criminal conduct and assign punishment for such conduct, the question of whether punishments imposed are unconstitutionally multiple is resolved by first determining just what punishment the legislative branch has authorized.[30] A "defendant's double jeopardy rights are violated if he or she is

[28] *State v. Leech,* 114 Wash.2d 700, 711, 790 P.2d 160 (1990) (citations omitted).

[29] *State v. Calle,* 125 Wash.2d 769, 776, 888 P.2d 155 (1995) (citing *Whalen v. United States,* 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715, 63 L.Ed.2d 715 (1980)).

[30] *Calle,* 125 Wash.2d at 776, 888 P.2d 155.

convicted of offenses that are identical both in fact and in law."[31]

Tortorelli argues he was put in double jeopardy because he was convicted at the same time of theft, trafficking in stolen property, offering a false instrument, and use of criminal proceeds. Tortorelli, however, does not directly dispute that these crimes are different crimes in law, and since the crimes have different elements,[32] such an argument would be meritless. Because he cannot establish that these crimes were the same in law, double jeopardy was not violated.

Tortorelli also argues that being charged with three different counts of theft violated double jeopardy. Since these three theft crimes are the same in law, the question is whether they were the same in fact. Tortorelli asserts that because his activities all occurred in Lake Washington, using the same equipment, and all within "relatively close periods of time," his conduct was one continuous criminal impulse constituting the same act. While our analysis is hampered by the inadequate record, it appears to us, viewing the information on its face, that the State acceptably separated these offenses by charging in three non-adjoining time periods.[33] The prosecutor's decision to charge three different counts for each crime, instead of only one appears to have been a proper exercise of discretion.[34] Because

[31] *Calle,* 125 Wash.2d at 777, 888 P.2d 155.

[32] RCW 9A.56.030(1)(a); RCW 9A.82.050; RCW 40.16.030; RCW 9A.82.080(1).

[33] See *State v. Perkerewicz,* 4 Wash.App. 937, 942, 486 P.2d 97, review denied, 79 Wash.2d 1006 (1971).

[34] See *State v. Lewis,* 115 Wash.2d 294, 299, 797 P.2d 1141

(continued...)

the same evidence was not used to prove each conviction, the three convictions for theft did not violate double jeopardy.

Finally, Tortorelli argues that he was put into double jeopardy because his crimes merged.[35] He asserts that the merger doctrine applies because in his case proof of one crime (e.g., theft) served as an element to prove another crime (e.g., stolen property). However, under Washington's merger doctrine, only when one offense is used to elevate the degree of another offense does the lesser offense merge into the greater offense.[36]

Although some courts have stated generally that merger applies if proof of one crime is a necessary element or constitutes proof of another crime,[37] that is not the proper analysis. The merger doctrine only "applies where a crime can be elevated to a higher degree by proof of another crime proscribed elsewhere in the criminal code."[38] Trafficking in stolen property is not such a crime. Thus, the merger doctrine

[34](...continued)
(1990).

[35] See *State v. Frohs*, 83 Wash.App. 803, 812, 924 P.2d 384 (1996).

[36] *State v. Contreras*, 124 Wash.2d 741, 745, 880 P.2d 1000 (1994).

[37] E.g., *State v. Garcia*, 65 Wash.App. 681, 689, 829 P.2d 241, review denied, 120 Wash.2d 1003 (1992).

[38] *State v. Eaton*, 82 Wash.App. 723, 730, 919 P.2d 116 (1996). See *State v. Vladovic*, 99 Wash.2d 413, 420-21, 662 P.2d 853 (1983).

does not apply to his stolen property convictions.[39] Similarly, it does not apply to his theft, offering a false document, and criminal profiteering convictions.

Sentencing

Tortorelli claims that his crimes should have been counted as one crime to determine his offender score. Whenever a defendant is sentenced for two or more current offenses, the trial court determines the sentence range for each offense by adding together all of the other current offenses and

[39] Cf. *State v. Strohm,* 75 Wash.App. 301, 310-11, 879 P.2d 962 (1994), review denied, 126 Wash.2d 1002 (1995). In *Strohm,* this court held that a person could be convicted under both the trafficking and theft statutes because in a "theft/trafficking case the thief transfers the stolen property to another." *Strohm,* 75 Wash.App. at 310, 879 P.2d 962. In *State v. Michielli,* 81 Wn.App. 773, 777-79, 81 Wash.App. 773, 916 P.2d 458, review granted, 130 Wash.2d 1007, 928 P.2d 415 (1996), another division of this court held otherwise. The Michielli court assumed that trafficking in stolen property "suggests at least a two- party transaction and reflects legislative intent to punish those who knowingly deal in property stolen by others." *Michielli,* 81 Wash.App. at 778, 916 P.2d 458. We decline to follow Michielli because RCW 9A.82.050 does not require that another steal the property. A person may be guilty of RCW 9A.82.050 if the person "traffics in stolen property [.]" Traffic has two definitions: "to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another" or "to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." RCW 9A.82.010(10). The second "to buy" scenario is the one the Michielli court envisions. But by providing the alternative "to sell" definition for "traffic," the Legislature did not require that the property be stolen by others.

prior convictions. If, however, the court finds that all or some of the current offenses encompass "the same criminal conduct," then those offenses may be counted as one crime.[40] Under RCW 9.94A.400(1)(a) to constitute the "same criminal conduct," the crimes must involve the same victim, the same criminal intent, and the same time and place.[41] Here, all of the offenses have the same victim, the State of Washington.

Tortorelli was charged with theft and trafficking in stolen property for three separate time periods. The first question is whether his criminal intent changed from when he stole the logs to when he sold the logs. To decide this, the court may look to "the extent to which one crime furthered the other, whether they were part of the same scheme or plan and whether the criminal objectives changed."[42] Tortorelli persuasively argues that harvesting and selling were one continuous impulse or plan, because one activity furthered another. The fact that the theft of the logs furthered the sale of the logs demonstrates that he had the same criminal intent. The inquiry does not stop there, however.

The next question is whether Tortorelli demonstrated that the crimes took place at the same time and place. It is not enough to show that one crime furthered another. That does not demonstrate same time and place, rather it demonstrates same criminal intent. In order to prove the same criminal conduct, Tortorelli must independently prove the same time and

[40] RCW 9.9A.400(1)(a).

[41] *State v. Vike,* 125 Wash.2d 407, 410, 885 P.2d 824 (1994).

[42] *State v. Calvert,* 79 Wash.App. 569, 578, 903 P.2d 1003 (1995), review denied, 129 Wash.2d 1005 (1996). See *State v. Dunaway,* 109 Wash.2d 207, 215-17, 743 P.2d 1237, 749 P.2d 160 (1987).

place element because under the statute all three separate elements must be present.[43]

Here, again, the lack of the trial and sentencing record impedes any effective review of this issue. Other than knowing the general dates of the criminal activity and that it took place on Lake Washington, we do not have an adequate record to judge whether the logs were stolen and sold in the same time and place.[44] On this sparse record, we cannot find that the trial court abused its discretion in finding the crimes involved different criminal conduct.

Tortorelli also has not established the same course of conduct for his other convictions. The three thefts took place at different times, as did the three trafficking offenses. The use of criminal proceeds offense[45] has a different criminal intent from his other crimes, as does offering a false document.[46]

Tortorelli argues that he should have been sentenced as a first time offender. While a trial court is permitted to sentence someone as a first time offender, it is not required to

[43] *State v. Maxfield,* 125 Wash.2d 378, 402, 886 P.2d 123 (1994); see also *State v. Garza-Villarreal,* 123 Wash.2d 42, 47, 864 P.2d 1378 (1993).

[44] Tortorelli asserts that in the State's closing argument, the prosecutor conceded that the crimes involved the same location, Lake Washington; the same victim, the State; and the same items, logs from the lake bottom. Even if we viewed closing arguments as evidence, which we do not, the State was making this argument in the context of arguing that individual thefts of the logs should be aggravated.

[45] RCW 9A.82.080(1).

[46] RCW 40.16.030.

do so.[47] He also contends that the trial court abused its discretion by not giving him an exceptional sentence below the standard range. This is not an appealable error. His sentence was within the standard range and he has shown no procedural error in his sentencing.[48]

Tortorelli argues that the trial court should have considered his ability to pay when setting the restitution amount. The consideration of the defendant's ability to pay, however, applies to the setting of the minimum monthly payment, not to the setting of the total restitution amount.[49] He also asserts that the State obtained restitution for crimes beyond the statute of limitations, because some of the predicate crimes for the crime of criminal profiteering were barred from prosecution by the statute of limitations. This argument is without merit. The State could charge criminal profiteering for the time period regardless. The trial court had the authority to order restitution for this count.[50]

We affirm.

[47] *State v. Welty,* 44 Wash.App. 281, 284, 726 P.2d 472, review denied, 107 Wn.2d 1002 (1986).

[48] RCW 9.94A.210(1); *State v. Friederich-Tibbets,* 123 Wash.2d 250, 252, 866 P.2d 1257 (1994).

[49] *State v. Huddleston,* 80 Wash.App. 916, 928-29, 912 P.2d 1068, review denied, 130 Wash.2d 1008 (1996).

[50] See RCW 9A.82.100.

WEST'S REVISED CODE OF WASHINGTON ANNOTATED

TITLE 76. FORESTS AND FOREST PRODUCTS

CHAPTER 76.36. MARKS AND BRANDS

76.36.010. Definitions

The words and phrases herein used, unless the same be clearly contrary to or inconsistent with the context of this chapter or the section in which used, shall be construed as follows:

(1) "Booming equipment" includes boom sticks and boom chains.

(2) "Brand" means a unique symbol or mark placed on or in forest products for the purpose of identifying ownership.

(3) "Catch brand" means a mark or brand used by a person as an identifying mark placed upon forest products and booming equipment previously owned by another.

(4) "Department" means the department of natural resources.

(5) "Forest products" means logs, spars, piles, and poles, boom sticks, and shingle bolts and every form into which a fallen tree may be cut before it is manufactured into lumber or run through a sawmill, shingle mill, or tie mill, or cut into cord wood, stove wood, or hewn ties.

(6) "Person" includes the plural and all corporations, foreign and domestic, copartnerships, firms, and associations of persons.

(7) "Waters of this state" includes any and all bodies of fresh and salt water within the jurisdiction of the state capable of being used for the transportation or storage of forest products, including all rivers and lakes and their tributaries, harbors, bays, bayous, and marshes.

[2000 c 11 § 16; 1984 c 60 § 1; 1925 ex.s. c 154 § 1; RRS § 8381-1.]

76.36.020. Forest products to be marked

Persons who wish to identify any of their forest products which will be stored or transported in or on the waters of the state shall place a registered mark or brand in a conspicuous place on each forest product item. Placement of the registered mark or brand is prima facie evidence of ownership over forest product items which have escaped from storage or transportation. Unbranded or unmarked stray logs or forest products become the property of the state when recovered.

[1984 c 60 § 2; 1925 ex.s. c 154 § 2; RRS § 8381-2. Prior: 1890 p 110 § 1.]

WEST'S REVISED CODE OF WASHINGTON ANNOTATED

CONSTITUTION OF THE STATE OF WASHINGTON

ARTICLE 17. TIDE LANDS

§ 1. Declaration of State Ownership

The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes: *Provided,* That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the state.

[Adopted 1889.]

UNITED STATES CODE ANNOTATED
TITLE 43. PUBLIC LANDS
CHAPTER 29--SUBMERGED LANDS
SUBCHAPTER I--GENERAL PROVISIONS

§ 1301. Definitions

When used in this subchapter and subchapter II of this chapter--

(a) The term "lands beneath navigable waters" means--

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the

Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: *Provided, however,* That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

[May 22, 1953, c. 65, Title I, § 2, 67 Stat. 29.]

§ 1311. Rights of States

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

. . . .

[May 22, 1953, c. 65, Title II, § 3, 67 Stat. 30.]

§ 1314. Rights and powers retained by United States; purchase of natural resources; condemnation of lands

(a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

[May 22, 1953, c. 65, Title II, § 6, 67 Stat. 32.]

§ 1315. Rights acquired under laws of United States unaffected

Nothing contained in this subchapter or subchapter I of this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter or subchapter I of this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: *Provided, however,* That nothing contained in this subchapter or subchapter I of this chapter is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law

under which such rights may be claimed in fact or in law applies to the lands subject to this subchapter or subchapter I of this chapter, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this subchapter or subchapter I of this chapter.

[May 22, 1953, c. 65, Title II, § 8, 67 Stat. 32.]